

San Diego Law Review

Volume 27
Issue 4 *Immigration and Nationality XV and
Pacific Rim Symposiums*

Article 5

11-1-1999

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Recommended Citation

Alan G. James, *Expatriation in the United States: Precept and Practice Today and Yesterday*, 27 SAN DIEGO L. REV. 853 (1990).

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Expatriation in the United States: Precept and Practice Today and Yesterday

ALAN G. JAMES*

Holmes wrote that in order to know what the law is, we must know what it has been, and what it tends to become. 1990 is a felicitous occasion to cast a backward glance and reflect on the profound changes that have occurred in the precept and practice of expatriation in the United States. Ten years have passed since the Supreme Court delivered its landmark decision of *Vance v. Terrazas*. The Nationality Act of 1940, the first all embracing compilation of statutory and common law provisions on nationality and expatriation became law half a century ago. And seventy-five years ago this past summer, Henry James, foremost American novelist of his time, forfeited United States citizenship by obtaining naturalization in Britain.¹

James' transfer of allegiance to the King of England in the second year of the Great War, unquestionably a voluntary act done with the intention of relinquishing United States citizenship, aroused lively interest in both Britain and the United States; enthusiastic approval in the former, censure in the latter. The event is an evocative episode in the annals of expatriation in America, not only because of the illustrious personage involved but also because of the reasons that led James to elect British nationality. American citizens who have

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1. For this author's essay regarding the loss of Henry James' American citizenship, see James, *A Memorable Naturalization: How Henry James Became a British Subject and Lost [H]is United States Citizenship*, in *THE HENRY JAMES REVIEW* 55 (1991). Alan James has no kinship to Henry James.

adopted another country as their own, primarily in response to the dictates of conscience are rare indeed. Simply put, James decided to become British to make a gesture of support at a time when Britain was fighting a cause which James believed should be the cause of the United States.

In his application for naturalization, which was approved in record time (Prime Minister Asquith was a sponsor), James eloquently explained why he decided to become British:

Because of his having lived and worked in England for the best part of forty years, because of his attachment to the country and his sympathy with it and its people, because of the long friendships and associations and interests he had formed there— these last including the acquisition of some property—all of which things have brought to a head his desire to throw his moral weight and personal allegiance, for whatever they may be worth, into the scale of the contending nation's present and future fortune.²

Not only did James acquire British nationality unusually quickly, he lost his United States citizenship just as fast. Under the provisions of the American expatriation statute then in effect, loss of citizenship occurred automatically once it was established that a citizen had obtained naturalization in a foreign state.³

James' expatriation is an instructive reference point in this comparison of present-day law, regulations and procedures with those of earlier times. Here the focus is on four major facets of expatriation: processing and documentation of loss of nationality cases; development of the role of the Department of State in expatriation; the constituent elements of a determination of loss of nationality; and administrative and judicial review of holdings of loss of citizenship made by the Department of State.

The history of expatriation in the United States has been one of slow but inexorable movement toward affirmation of the right of a United States citizen to remain a citizen unless he or she manifests an intention to terminate citizenship. In contrast to the remote and not so remote past, American citizens today enjoy a multitude of safeguards against arbitrary administrative action with respect to their citizenship. The rules, regulations and procedures for processing and determining loss of nationality cases, as well as the statutory right of administrative and judicial review of decisions of loss of nationality, give procedural protection to the Constitution's grant of citizenship.

2. "The Humble Memorial of Henry James, an Alien" to the Secretary of State for the Home Dept., July 5, 1915 (on file at the Public Record Office, London, England).

3. Act of March 2, 1907, ch. 2534, § 2, 34 Stat. 1228 (1907) (codified at 8 U.S.C. § 17 (1988)), provided in pertinent part:

That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign State.

Several distinct periods mark the search for a widely accepted public policy on expatriation. In the early days of the Republic, confusion arose from disagreement between the executive and judicial branches about the basic question of whether the feudal doctrine of indefeasible allegiance applied in the United States. The courts tended to the view that, in the absence of a contrary expression by Congress, expatriation could only occur with the approval of the State. The executive, concerned about protecting naturalized American citizens against the claims of their birth states, considered expatriation a natural right. The issue was settled in 1868 when Congress declared that expatriation is a natural and inherent right of all people. The 14th Amendment to the Constitution, which also was approved in 1868, defined who is a citizen, but Congress did not then, or until many years later, define how a citizen might forfeit citizenship. There followed a period of nearly 40 years in which the Department of State, without benefit of legislative mandate, made determinations of loss of nationality.

In 1907 Congress enacted the first general statute prescribing what acts would result in expatriation. In succeeding years, notably in 1940 and 1952, Congress lengthened the list of expatriative acts, as the executive and legislative branches, with approval of the courts, proscribed, on pain of forfeiture of citizenship, conduct deemed likely to be prejudicial to foreign relations. In the late 1950s and during the 1960s the Supreme Court struck down a number of statutory provisions for expatriation as constitutionally infirm. The grand climacteric of the Supreme Court's examination of the constitutional limits of Congressional power to enact expatriation legislation came in 1967 when the Court held that the grant of citizenship of the 14th Amendment⁴ is absolute and was designed to protect every citizen against a forcible destruction of citizenship. After 200 years there is now in all branches of government a consensus that an American citizen, natural born or naturalized, has a constitutional right to remain a citizen unless he/she voluntarily assents to relinquish citizenship.

I. PROCESSING AND DOCUMENTATION

The processing and adjudication of putative loss of nationality cases are governed by law, federal regulations, and elaborate guide-

4. "All persons born or naturalized in the United States are subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

lines of the Department of State. The Immigration and Nationality Act of 1952 prescribes that whenever a diplomatic or consular officer has reason to believe that a United States citizen has lost citizenship by performing a statutory expatriative act in a foreign state, the officer shall certify the facts upon which such belief is based to the Department of State, in writing.⁵ The guidelines of the Department of State, the *Foreign Affairs Manual*, spell out how diplomatic and consular officers should develop and document a potential loss of nationality case.⁶ Upon learning that a citizen has performed a statutory expatriative act, the officer concerned must inform the citizen that he or she may have lost citizenship by performance of the particular expatriative act and invite the person to present evidence for the Department to consider in determining whether expatriation had occurred. When the case has been developed, the officer is to execute a certificate of loss of nationality, attach to it the relevant supporting documents and recommend whether the certificate should or should not be approved.⁷

Upon receipt of the officer's report, the Secretary of State (in practice, his or her designee) is required to approve or disapprove the certificate of loss of nationality.⁸ The statutory provision that the Secretary of State shall approve or disapprove a certificate of loss of nationality is construed by the Department of State to require that the Secretary review the proceedings and make a reasoned judgment under the criteria of the Immigration and Nationality Act and judicial decisions whether the citizen expatriated himself or herself.⁹

5. Immigration and Nationality Act § 358, 8 U.S.C. § 1501 (1988) [hereinafter "INA"], provides that:

Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

6. U.S. Dept. of State, 7 *Foreign Aff. Manual* §§ 1210, 1220, & 1250 (1984).

7. *Id.* § 1220.

8. INA, *supra* note 4, § 358.

9. *Cf. Whitehead v. Haig*, 794 F.2d 115, 118 (3rd Cir. 1986). With respect to INA § 358, 8 U.S.C. § 1501, the court said "the functions required of the various entities are purely ministerial." The Court continued:

The language of the statute itself does not speak in terms common to those prescribing administrative procedures. It speaks only in terms directing an automatic transmittal, for informational purposes, of certified facts related to the expatriation of a United States citizen. Legislative history of the section confirms our view that § 1501 was not intended to provide any mechanism for administrative adjudication or determination by the Secretary of State as part of its mandate to approve and issue the Certificate of Loss. In the letter of

If a certificate of loss of nationality is approved, the Secretary must send a copy to the Department of Justice for the information of the Immigration and Naturalization Service, thus alerting that Department that a citizen has become an alien and subject to exclusion or deportation unless properly documented as an alien. The Secretary is also to instruct the foreign service post which prepared the report to forward a copy to the person to whom it relates.¹⁰

Since the cases hold that citizenship is shielded by the Fifth Amendment to the Constitution, the Amendment's injunction that no person shall be "deprived of life, liberty or property without due process of law" requires that an individual whose citizenship rights are being determined in an administrative proceeding be given adequate notice, an opportunity to be heard before an impartial hearing officer, and a reasoned final decision based upon a written evidentiary record.¹¹

When Henry James expatriated himself, a person could not be said to enjoy protection comparable to that to which an expatriated person is entitled today. In the case of Henry James, once the essential facts had been established — namely, that he had obtained naturalization in Great Britain in conformity with its laws — he automatically lost his United States citizenship. The Act of March 2, 1907 prescribed that any citizen of the United States would be "deemed" to have expatriated himself when he obtained naturaliza-

submittal from the President accompanying the proposed Nationality Laws of the United States dated June 1, 1938, the committee designated by Executive order to revise and codify the nationality laws into a comprehensive law for submission to Congress stated the following:

The provisions of Chapter IV, Loss of Nationality, are of special importance. Loss of nationality is in all cases to result from the existence of stated facts. In this relation mention may be made to the provisions of [sec. 1501], in which diplomatic and consular officers are required to send to the Department of State reports concerning persons found by them to have committed acts resulting in loss of American nationality under the provisions of Chapter IV of the proposed act. It is important to note that such reports are intended merely for the information of the Department of State, the Department of Labor, and any other branches of the Government which may be interested.

Message from the President of the United States, Nationality Laws of the United States, 76th Cong., 1st Sess. vi (Comm. Print 1938). Apparently, the purpose and function of § 1501 is that of governmental record-keeping and notification to the affected person of the existence of such record.

10. INA, *supra* note 4, § 358.

11. See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Quon Quon Poy v. Johnson, 273 U.S. 352 (1927).

tion in a foreign state.¹²

In 1915, diplomatic and consular officers, upon learning that an American citizen had obtained naturalization in a foreign state (or performed another act designated by statute as expatriative), were instructed to certify the facts under their seal and transmit the certification to the Department of State.¹³ It was not the custom, as the Department's guidelines now require, that proceedings be held at the diplomatic or consular office which certified that a citizen had performed an expatriative act. There were no proceedings in the case of Henry James. Thus, upon being informed by the British authorities that James had obtained a certificate of naturalization, Ambassador Page's sole duty was to certify that fact to the Department. If, however, the individual involved was a naturalized United States citizen who had resided in the country of his or her birth for two years or any other country for five years, there might have been a proceeding at the diplomatic or consular office concerned. The Act of March 2, 1907 codified a presumption that any such person had ceased to be a United States citizen, but provided that the presumption might be "overcome" by the presentation to a diplomatic or consular officer of facts showing a valid reason for staying abroad and establishing an intent to return to the United States to reside permanently.¹⁴

12. See *supra* note 1.

13. The Department Circular from Elihu Root, the Secretary of State, to the Diplomatic and Consular Officers of the United States (April 19, 1907) reads as follows:

Whenever it comes to the knowledge of a diplomatic or consular officer that an American citizen has secured naturalization in a foreign state in conformity with its laws, . . . such diplomatic or consular officer should certify to the facts under his seal and should transmit the certificate to this department.

U.S. Dept. of State, *Compilation of Certain Departmental Circulars Relating to Citizenship, Registration of American Citizens, Issuance of Passports, etc.* (1925).

14. Act of March 2, 1907, § 2 Ch. 2534, 34 Stat. 1228 (1907) (currently codified at 8 U.S.C. § 17 (1988)), had the following provision with respect to naturalized citizens:

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however*, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also*, That no American citizen shall be allowed to expatriate himself when this country is at war.

As to handling the cases of naturalized citizens who resided abroad in excess of the time allowed, Root's circular stated that:

If the citizen who has thus acquired foreign naturalization was a naturalized citizen of the United States, the fact should be stated in the certification and the certificate of American naturalization should, if possible, be taken up and forwarded to the department with the certification. . . .

When a naturalized citizen of the United States has resided for two years in the country of his origin, or for five years in any other country, this fact creates a presumption that he has ceased to be an American citizen, but the presumption may be overcome by his presenting to a diplomatic or consular officer

In 1915 there was no statutory or other prescription that the Secretary of State should take any specific action on the report of a diplomatic or consular officer. If an officer certified that a proscribed act had been done, that was the end of the matter.

Neither in 1915 nor in prior years was the Department of State under any legal mandate, as it is today, to apprise other concerned agencies that it had made a finding of loss of United States citizenship. Only with enactment of the Nationality Act of 1940 was the Department of State charged with the responsibility of informing the Department of Justice that it had made a determination of loss of citizenship.¹⁵

Before 1940, there was no statutory provision for the Department of State to issue a certificate attesting that a person had lost United States citizenship.¹⁶ Individuals whom the Department held had expatriated themselves were issued no document as proof of loss of citi-

proof establishing the following facts: . . .

In general, the facts to be established were that the naturalized citizen was residing abroad for business, health or education, and intended to return eventually to the United States to reside. The evidence to overcome the presumption of expatriation was to be "of the specific facts and circumstances which bring the alleged citizen under one of the foregoing heads, and mere assertions, even under oath, that any of the enumerated reasons exist will not be accepted as sufficient."

So much of the instruction as related to residence abroad was not applicable to natural-born citizens.

The Department's construction of the expatriation presumption changed repeatedly until 1926 when Secretary of State Kellogg informed the Attorney General that

[i]n view of the diversity of opinion of various Departments of this Government, and because of certain decisions of courts which do not appear to accord entirely with the strict construction of the statute contained in the memorandum mentioned, [the Department of State] has reconsidered this subject and has come to the conclusion that, in the absence of a decision of the court of last resort, the presumption of having ceased to be an American citizen arising under the second paragraph of Section two of the Act of March 2, 1907, should be regarded as existing only while the naturalized American citizen against whom such presumption has arisen continues to reside abroad and that upon his return to the United States and his reestablishment here in good faith of a permanent residence the reason for which the presumption was created no longer exists.

III G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 295 (1942) ("Secretary Kellogg to Attorney General Sargent, Mar. 26, 1926, MS Department of State, file 130/741 b").

The view persisted in the Department, however, that residence abroad should work expatriation of naturalized citizens, and the Department succeeded in having a provision for loss of nationality by such persons enacted in the Nationality Act of 1940 from which the rebuttable presumption was omitted. A substantially similar provision was made in INA § 352, 8 U.S.C. § 1484 (1988), which the Supreme Court declared unconstitutional in *Schneider v. Rusk*, 377 U.S. 163 (1964). See *infra* note 28.

15. The applicable provision was Nationality Act of 1940 § 501, 54 Stat. 1171 (1940). INA § 358 is virtually identical. *Supra* note 4.

16. III C. HYDE, *INTERNATIONAL LAW* § 382, at 1160, n.2 (1945).

zenship. In the latter part of the 19th century and early 20th century, United States citizens on occasion asked the Department of State to issue a certificate, usually requested by a foreign government for purposes of naturalization to ensure that the United States government did not object to the person's change of allegiance. This the Department consistently refused to do, essentially because issuance of such a document might be interpreted as giving official sanction to expatriation, and thus in effect, perpetuating the doctrine of indefeasible allegiance which the United States categorically repudiated in 1868. As Secretary of State Gresham explained in 1894 to the United States Minister to Russia:

. . . I am aware of no statute authorizing or making it the duty of a diplomatic or other officer of the United States to give such a certificate. Mr. Hess' right to abandon his American citizenship, under the laws of this country, cannot be questioned. This Government holds that the 'right of expatriation is a natural and inherent right of all people' (Rev. Stat. U.S., sec. 1999), and it would seem that by calling the attention of the Imperial Government to that provision Mr. Hess can accomplish his purpose.¹⁷

II. THE ROLE OF THE DEPARTMENT OF STATE IN EXPATRIATION

The Immigration and Nationality Act of 1952 authorizes the Secretary of State to make determinations of loss of nationality by providing that the Secretary "shall be charged with the administration and enforcement of the provisions of this Act and all other immigration and nationality laws relating to . . . (3) the determination of nationality of a person not in the United States."¹⁸ Earlier legislation also provided a statutory basis for the Secretary of State to make determinations with respect to nationality.¹⁹

Before 1907, however, there was no general legislation defining what acts would constitute expatriation,²⁰ and during the first eighty

17. III J. MOORE, A DIGEST OF INTERNATIONAL LAW § 466, at 714 (1906) (Mr. Gresham, Sec. of State, to Mr. White, Min. to Russia, Oct. 2, 1894, For. Rel. 1894, 557).

See also the statement of Secretary Blaine (June 5, 1890) to the Danish Minister Count Sponneck, that under existing statutes, the Department of State was not competent "to issue at their request certificates to particular citizens admitting the renunciation of their allegiance." *Id.* § 466 at 714-15.

18. INA § 104(a), 8 U.S.C. 1104(a) (1988).

19. The Nationality Act of 1940, ch. 876, 54 Stat. 1168 (1940); the Act of March 2, 1907, ch. 2534, 34 Stat. 1228 (1907).

20. The only statutory provision for loss of citizenship in force before 1907 was the Act of March 3, 1865, §§ 1996 & 1998 of the Revised Statutes, which prescribed that desertion from the military or naval service, or avoidance of the military draft would work forfeiture of citizenship.

In 1868 and in succeeding years, the United States concluded a series of treaties, principally with a number of European countries, which provided that the citizens of one of the signatories who obtained naturalization in the other signatory's country would be recognized by the state of origin as having obtained the nationality of the receiving state. See *infra* text accompanying note 39.

years of the Republic, there was "conflict in precept and confusion in practice" over nationality and expatriation in the United States, where ideas of nationality and expatriation were in "ferment."²¹ Generally, the executive and judicial branches held differing views on whether the common law doctrine of indefeasible allegiance applied in the United States. "In the early days of this Nation," Chief Justice Warren wrote, "the right of expatriation had been a matter of controversy," noting that the common law doctrine of perpetual allegiance was "evident in the opinions of this Court."²² Officials of the executive branch "were not unwavering in their support of expatriation," the Chief Justice added.²³

A. *Indefeasible Allegiance versus the Right of Expatriation*

The naturalization laws of the United States, among our earliest legislative acts, rested on the principle that one who sought naturalization here had the right to cast off previous allegiance without the sanction of the country of his or her nativity. Indeed, the signers of the Declaration of Independence indicated that they considered expatriation indispensable to enjoyment of the rights of life, liberty and the pursuit of happiness. In the Declaration's catalog of the "repeated injuries and usurpations" of the British King was cited the fact that he "has endeavored to prevent the population of these states; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither."²⁴

From the first, persons naturalized here were required to renounce their previous nationality.²⁵ Although officials of the executive

21. Mr. Justice Jackson, speaking for the Court in *Mandoli v. Acheson*, 344 U.S. 133, 135 (1952).

22. *Perez v. Brownell*, 356 U.S. 44, 67 (1958) (Warren, C.J., dissenting).

The opinions cited by the Chief Justice were *Shanks v. Dupont*, 3 Pet. 242 (1830), and *Inglis v. Trustees of Sailor's Snug Harbor*, 3 Pet. 99 (1830).

"Generally, the federal judges, influenced by the practical desire to maintain a uniformity of law in the country, and also being still accustomed to the English legal system, were inclined to abide by the doctrine of perpetual allegiance." I. TSIANG, *THE QUESTION OF EXPATRIATION IN AMERICA PRIOR TO 1907*, 42 (1942) [hereinafter *EXPATRIATION*].

Tsiang's treatise is a rich source of the evolution of expatriation in the United States up to enactment of the Act of 1907.

23. *Perez*, 356 U.S. at 67.

24. The Declaration of Independence para. 9 (U.S. 1776). (This was the seventh of the "Facts . . . submitted to a candid world" by the Signers).

25. There was undeniable force in the assertion of one representative who said in 1797 during the Congressional debate on an expatriation bill: "It would, indeed, be dishonorable for us to hold out [the] doctrine [of perpetual allegiance] after inviting people

branch may not have been “unwavering” in their support of the doctrine of expatriation during the first eighty years of the Republic, Secretaries of State with fair consistency upheld the proposition inherent in the naturalization laws of the United States that one who came to the United States and became a citizen had a right to do so without the prior sanction of his former sovereign or state. And in the first three-quarters of a century of the Republic a central concern of the Department of State was protection of naturalized American citizens abroad against claims of the state of their nativity to their services as soldiers or seamen. During this time, Secretaries of State issued opinions on whether a United States citizen had become expatriated by performing act inconsistent with United States citizenship. That practice, however, was far less extensive than in the last third of the 19th century.

Secretaries of State Jefferson,²⁶ Marshall,²⁷ Madison,²⁸ and Monroe²⁹ vigorously defended the view that expatriation is a natural right. In part to vindicate the principle of the right of expatriation, the United States went to war in 1812 with Great Britain when British impressment of naturalized American seamen who were born in Britain became intolerable. When the war ended, British impressment of seamen stopped, and friction between the two countries over the right of expatriation eased. Over the ensuing fifty years, however, tension over the issue resurfaced from time to time. For exam-

to come here in crowds from foreign countries.” I. TSIANG, *EXPATRIATION*, *supra* note 21, at 39, citing *ANNALS OF CONGRESS*, 352, 5th Cong. 1st Sess.

26. “Our citizens are certainly free to divest themselves of that character by emigration and other acts manifesting their intention, and many then become the subjects of another power and free to do whatever the subjects of that power may do.”

III J. MOORE, *supra* note 16, at § 434, at 562 (“Mr. Jefferson, Sec. of State, to Mr. G. Morris, Aug. 16, 1793, 4 Jeff. Works (Washington’s ed.), 37”).

27. Protesting the failure of Spain to honor an arbitrated award to certain naturalized United States citizens, Marshall in 1800 sent the following instruction to the American Minister in Madrid: “The right of naturalizing aliens is claimed and exercised by the different nations of Europe, as well as by the United States. When the laws adopt an individual no nation has a right to question the validity of the act, unless it be one which may have a conflicting title to the person adopted. Spain therefore cannot contest the fact that these gentlemen are American citizens.”

III J. MOORE, *supra* note 16, at § 434, at 563 (“Mr. Marshall, Sec. of State, to Mr. Humphreys, Sept. 23, 1800;” Moore, *Int. Arbitrations*, II. 1001; *MS. Inst. U. States Ministers*, V. 383”).

28. “There can be no doubt that, on the same principle which admits of aliens being naturalized in the United States, they may afterwards cast off the character of American citizen and resume their former allegiance or take that of any other country. III J. MOORE, *supra* note 16, at 735 (“Mr. Madison, Sec. of State, to Mr. Murray, June 16, 1803, 1 MS Desp. to Consuls, 168”).

29. Monroe told the British Minister at Washington that Great Britain should not object to United States policy on naturalization. “It is impossible for the United States to discriminate between their native and naturalized citizens,” he said, adding, “Nor ought your Government to expect it. . . .”

I. TSIANG, *EXPATRIATION*, 48 (“Monroe to Foster, May 30, 1812, *American State Papers, Foreign Relations, 1789-1828*, III. 454”).

ple, in 1848 when the British authorities arrested and refused to recognize as American citizens certain persons born in Ireland but naturalized in the United States, Secretary of State Buchanan sent this forceful instruction to the American Minister in London:

Whenever the occasion may require it, you will resist the British doctrine of perpetual allegiance, and maintain the American principle that British native-born subjects, after they have been naturalized under our laws, are, to all intents and purposes, as much American citizens, and entitled to the same degree of protection, as though they had been born in the United States.³⁰

Relations became strained as well between the United States and other European states as immigrants who came to the United States in the 1840s and 1850s obtained U.S. naturalization and frequently returned to their native countries for various reasons and for varying periods of time. This was particularly true of some of the German states. The arrest and forcible induction into the Hanoverian army in 1859 of one Ernst, who was born in Hanover and obtained naturalization in the United States, produced a ringing affirmation of the right of expatriation by Attorney General Black.³¹ Urging President Buchanan, who had sought his opinion, to "interfere promptly and decisively" on behalf of Ernst, Black declared:

The natural right of every free person, who owes no debts and is not guilty of any crime, to leave the country of his birth in good faith and for an honest purpose, the privilege of throwing off his natural allegiance and substituting another allegiance in its place — the general right, in one word, of expatriation, is incontestable. . . . We take it from natural reason and justice, from writers of known wisdom, and from the practice of civilized nations. All these are opposed to the doctrine of perpetual allegiance. It is too injurious to the general interests of mankind to be tolerated; justice denies that men should either be confined to their native soil or drive away from it against their will.³²

30. III J. MOORE, *supra* note 16 at § 435, at 566 ("Mr. Buchanan, Sec. of State, to Mr. Bancroft, min. to England, Oct. 28, 1848, 47 Brit. & For. State Pap. 1236, 1237").

31. 9 Op. Att'y. Gen. 356 (1859).

32. *Id.* at 357-58.

Ernst was released from military service after the Secretary of State, as instructed by the President, lodged a stiff protest with the Hanoverian authorities. The latter, however, made no concession on the principle of perpetual allegiance.

Black's opinion is notable too for his insistence that there could be no distinction between the rights of native-born and naturalized citizens. Forecasting the position the Supreme Court took a century later in *Schneider v. Rusk*, 377 U.S. 163 (1964) (holding unconstitutional section 352 of the INA which provided for expatriation of naturalized citizens who resided abroad in excess of the statutorily prescribed period of time), Black wrote:

In regard to the protection of our citizens in their rights at home and abroad we have no law which divides them into classes, or makes any difference

B. Expatriation: A Natural and Inherent Right

By outbreak of the Civil War it was widely accepted in the United States that the doctrine of perpetual allegiance was not only an anachronism but also inimical to the interests of the United States. Wartime exigencies, however, constrained the United States from vigorously contesting the right of the states of origin of naturalized United States citizens to levy claims on their persons or property. When the war ended, Congress put citizenship and expatriation in a prominent place on its legislative agenda. Bills were introduced to proscribe loss of citizenship for performance of specified acts and to provide a means whereby one might voluntarily relinquish citizenship. (None passed.) In June 1866 Congress proposed and sent to the States the 14th Amendment to the Constitution.

Meanwhile, earlier in 1866, the United States and Britain again confronted each other over the right of expatriation. A number of naturalized American citizens who had been born British subjects were arrested by the British authorities in Ireland and placed on trial for implication in the Feinian movement. The United States reacted sharply. Secretary of State Seward warned the British that the controversy could find a friendly resolution only by concession, in the form of a treaty, or of mutual legislation, or some form of arbitration.³³ Other such naturalized American citizens were arrested by the British authorities in 1867. British refusal to treat these persons as United States citizens "produced an excitement that, as Mr. Seward stated, extended 'throughout the whole country, from Portland to San Francisco and from St. Paul to Pensacola.' The topic was discussed in Congress, and exhaustive reports were made both in the Senate and the House of Representatives on the subject of expatriation."³⁴

The upshot of this "excitement" was the passage of the Act of July 27, 1868, entitled "An Act Concerning the Rights of American Citizens in Foreign States."³⁵ The Act declared:

Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states,

whatever between them. A native and a naturalized American may, therefore, go forth with equal security over every sea and through every land under heaven, including the country in which the latter was born.

9 Op. Att'y Gen. at 360.

33. III J. MOORE, *supra* note 16 at § 439, at 579-80.

34. *Id.* at 580.

35. Title XXV, Citizenship, 18 Rev. St. §§ 1999-2001 (1874). Sec. 1999 has been incorporated in 8 U.S.C. 1481 (1988).

owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the principles of the Republic.³⁶

Congress gave this statement of principles teeth by providing that naturalized citizens should, while abroad, be "entitled to, and shall receive from the Government the same protection of persons and property which is accorded to native-born citizens."³⁷ The Act also charged the President to intervene with any foreign government on behalf of any citizen of the United States who appeared to have been wrongfully imprisoned.³⁸ The following day, the 14th Amendment to the Constitution was ratified.

The principles enunciated in the Act of July 27, 1868 remain a charter for all American citizens who freely decide to divest themselves of that citizenship: no officer of the government may gainsay a citizen the right to expatriate himself.

C. The Bancroft Treaties

While Congress was debating the bill that became the Act of July 27, 1868, the Department of State was negotiating treaties with a number of European states in an effort to eliminate irritants in relations with those states arising from the American naturalization of their citizens. Many European states, Prussia prominent among them, required all their male citizens to perform military service. Even naturalization in a foreign state would not excuse the nationals of those states from being seized and forced to perform military service if they returned to their country of origin. The heavy migration to the United States in mid-century of nationals of the German states therefore caused difficulties before the Civil War and afterward when many naturalized American citizens, including veterans, returned to their land of origin. The American Minister in Berlin, historian and diplomat George Bancroft, was charged with the task of negotiating an agreement with the North German Confederation, under the leadership of Prussia, to ameliorate the problem.

In carrying out his assignment, Bancroft was singularly successful, for the United States negotiated from a position of strength. A "new and mightier" United States had emerged from the Civil War. Writ-

36. Title XXV, Citizenship, 18 Rev. S.L. § 1999, at 350-51.

37. *Id.* § 2000 at 351.

38. *Id.*

ing to President Johnson in 1867, Bancroft said this of the European perception of post-civil war America: "Public consideration of the United States stands very high in Europe and is increasing. . . . The indirect influence of our vitality is exceedingly great."³⁹ Among European statesmen, Bismark in particular was anxious to maintain good relations with the United States.

The first and bellwether of the series of treaties known as the Bancroft treaties was concluded by Bancroft with the North German Confederation on February 22, 1868.⁴⁰ Typically, these treaties provided that each of the signatories would acknowledge as a citizen of the other such of its citizens who became naturalized by the other. The treaties thus removed a serious irritant from the relations of the United States with the states with which they were concluded. But the treaties did more than that, as Mr. Justice Frankfurter pointed out nearly one hundred years later: "This series of treaties initiated this country's policy of automatic divestment of citizenship for specified conduct affecting our foreign relations."⁴¹ The Bancroft Treaties virtually prescribed loss of citizenship. For example, if a German, who was naturalized in the United States, were to renew residency in North Germany for a certain period of time without the intent to return to the United States, she would be held to have renounced her naturalization in the United States. The same consequences would result if an American became naturalized in North Germany and renewed residence in the United States.⁴²

It was not long thereafter that the United States and Great Britain closed the book on their long-standing confrontation over the right of expatriation. In 1870, by Act of Parliament, Great Britain finally abandoned the "hoary shibboleth", "once an Englishman, always an Englishman," and declared that any British subject who became naturalized in another country would become an alien under British law.⁴³ Later that year, the United States and Great Britain concluded a convention on naturalization.⁴⁴ In distinction to the Bancroft Treaties, the Anglo-American convention of 1870 merely provided that citizens of the United States who were naturalized as British subjects would be recognized as such by the United States; and British subjects who obtained naturalization in the United

39. THE LIFE AND LETTERS OF GEORGE BANCROFT 202 (M. Howe ed. 1908).

40. 15 Stat. 615 (1868).

Bancroft personally negotiated similar conventions with Baden, Bavaria, Hesse, and Wuerttemberg. Other American diplomats concluded analogous treaties with other European states as well as certain Caribbean nations.

41. Speaking for the Court in *Perez v. Brownell*, 356 U.S. 44, 48 (1958).

42. Article IV of the Treaty between the United States and the North German Confederation. 15 Stat. 615 (1868).

43. 33 & 34 Vict. 105, c.14.

44. 16 Stat. 725 (1870).

States would be so recognized by Britain.

D. The Department of State Steps Into A Legislative Vacuum

The Act of July 27, 1868 ended the "conflict in precept" over whether the doctrine of perpetual allegiance applied in the United States but it did not prescribe what acts would constitute expatriation. Since American citizens, natural-born or naturalized, went abroad in growing numbers after the Civil War, the Executive considered it imperative that Congress enact expatriation legislation. In 1874 President Grant explained to a Congress that was little disposed to act why a comprehensive statute was needed.

Notwithstanding such assertion [in the Act of July 27, 1868 that expatriation is a natural and inherent right] and the necessity of frequent application of the principle, no legislation has been had defining what acts or formalities shall work expatriation or when a citizen shall be deemed to have renounced or to have lost his citizenship. The importance of such definition is obvious. The representatives of the United States in foreign countries are continually called upon to lend their aid and the protection of the United States to persons concerning the good faith or the reality of whose citizenship there is at least great question. In some cases the provisions of the treaties furnish some guide; in others it seems left to the person claiming the benefits of citizenship, while living in a foreign country, contributing in no manner to the performance of the duties of a citizen of the United States, and without intention at any time to return and undertake those duties, to use the claims to citizenship of the United States simply as a shield from the performance of the obligations of a citizen elsewhere.⁴⁵

Since Congress would not act, the Department of State was "forced to look elsewhere for an enumeration of the acts" that would work expatriation, wrote Secretary of State Hamilton Fish in 1873.⁴⁶ Observing that Chief Justice Marshall, speaking for the Supreme Court, had said that the situation of an American citizen "is completely changed, where, by this own act, he has made himself the subject of a foreign power (2 Cranch. 119)," ⁴⁷ Fish stated that Marshall's opinion was recognized as furnishing, as far as it went, a rule of action for the Department of State, but, he added, there were other cases

. . . in which the voluntary expatriation is to be inferred, not from an open act of renunciation, but from other circumstances, as, for instance, a residence in a foreign land so constant, and under such circumstances, that a purpose of a change of allegiance may be reasonably assumed. Each case as

45. Annual Message, Dec. 7, 1874. IX MESSAGES AND PAPERS OF THE PRESIDENTS 4245-46 (J. Richardson ed. 1897).

46. III J. MOORE, *supra* note 16 at § 466, at 712 ("Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, June 28, 1873, For. Rel. 1873, I. 256, 258").

47. *Murray v. The Charming Betsy*, 2 Cranch. 64, 120 (1804).

it arises must be decided on its merits.⁴⁸

Two months later, Attorney General Williams, responding to questions put to him (and to all other members of the Cabinet) by President Grant, delivered a comprehensive opinion on expatriation and citizenship.⁴⁹ Williams cited the following as expatriating acts:

Residence in a foreign country and an intent not to return, are essential elements of expatriation; but to show complete expatriation as the law now stands, it is necessary to show something more than these. Attorney-General Black says, (9 Opin., 359,) that expatriation includes not only emigration out of one's native country, but naturalization in the country adopted as a future residence.

My opinion, however, is that, in addition to domicile and intent to remain, such expressions or acts as amount to a renunciation of United States citizenship and a willingness to submit to or adopt the obligations of the country in which the person resides, such as accepting public employment, engaging in military services, & c., may be treated by this Government as expatriation, without actual naturalization. Naturalization is without doubt the highest, but not the only, evidence of expatriation.⁵⁰

Williams' opinion is also notable for his ruling that the Act of July 27, 1868 should be construed as including native-born as well as naturalized citizens, and that "the Executive should give it that comprehensive effect."⁵¹ The Attorney General concluded by observing that in the absence of legislation on expatriation, "the rules of law relating thereto are to be drawn from writers upon international and public law, who do not always agree, and therefore it will be difficult for the Government to act upon any such rules without chance of controversy."⁵²

The Act of July 27, 1868 and Attorney General Williams' opinion provided a legal basis for the Department of State to act, and act it did in the last third of the 19th century. The Department made rulings, often drafted by the Secretary of State personally, on forfeiture of citizenship. Usually, these rulings were made in response to the requests of diplomatic and consular officers for the Secretary's opinion whether a United States citizen had expatriated himself by performing an act ostensibly in derogation of citizenship. Of these rulings it has been said: "Strictly speaking, it is beyond the competence of the executive, without legislative authorization, to declare a citizen to be expatriated, although the extension or withdrawal of diplomatic protection is within executive discretion."⁵³ But no one challenged the authority of the Department to make determinations of loss of citizenship because, it is fair to assume, such a role was gen-

48. III J. MOORE, *supra* note 16, at § 466, at 712.

49. 14 Op. Atty. Gen. 295 (1873).

50. *Id.* at 296.

51. *Id.*

52. *Id.* at 300.

53. I. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD, § 324 p. 689 (1915).

erally perceived to be a reasonable exercise of the Department's foreign affairs responsibilities.

A sampling of rulings made by Secretaries of State in the last third of the 19th century and the early years of the 20th will illustrate the varied circumstances under which expatriation was deemed to have occurred—or not to have occurred. Throughout that period, the rulings show fair consistency with respect to matters of substance from one administration to another.

The following opinion issued by Secretary of State John Hay in 1898 expresses a position on obtaining naturalization in a foreign state that was typical of rulings on what Attorney General Williams called "the highest evidence of expatriation."⁵⁴ The occasion was the request of the United States Minister at Monrovia for guidance as to how he should treat "certain citizens who, having emigrated to Liberia and acquired the rights of citizenship in that Republic, still claim that they are citizens of the United States." Hay began by noting that

the Liberian Government does not require colored persons going from the United States to that Republic to renounce their allegiance to the Government of the United States or to take out naturalization papers, as is required in the case of immigrants from other countries, but that the fact of such a colored citizen of the United States taking out an allotment of land enables him to be regarded for all national purposes as a Liberian citizen.⁵⁵

He then observed that "analogous questions" had arisen previously regarding the status of American citizens residing in Hawaii, St. Thomas and other places, where an alien taking up residence was admitted to citizenship without forswearing allegiance to the United States. "In the case of Hawaii," Hay noted,

[T]he formal act of admission to citizenship and the oath taken by the applicant purported to preserve the original allegiance for all effects not connected with domicile in Hawaii.

Mr. Secretary Gresham, and after him Secretaries Olney and Sherman, held that an American so naturalized in Hawaii effectively lost his United States citizenship.⁵⁶

With reference to the Minister's inquiry, Hay stated:

In the case of an American in Liberia, which you report, the omission of an oath of allegiance or requirement of formal naturalization, constituting a peculiar exception in favor of American citizens, would at first sight appear to modify the principle involved in the Hawaiian decision. In fact, however, the principle involved is substantially the same. The Republic of Liberia is

54. III J. MOORE, *supra* note 16 at § 468, at 729-30 ("Mr. Hay, Sec. of State, to Mr. Smith, min. to Liberia, No. 20, November 6, 1898, MS. Inst. Liberia, II 346").

55. *Id.*

56. *Id.*

an independent sovereignty, in no wise bound to or dependent upon the United States, and, theoretically at least, it is within the range of possibilities that differences might arise between the two governments leading even to rupture of relations. It is inconsistent for an individual to bear true allegiance at the same time to two different sovereigns, and the exercise of the rights of citizenship under any alien sovereignty must be regarded as a voluntary assumption of the obligations of allegiance to such sovereignty.

As a doctrine, therefore, it may be said that when a citizen of the United States acquires, by whatever process, the status of a Liberian citizen he performs an act incompatible with his allegiance to the United States and with his citizenship thereof.⁵⁷

The Department uniformly held that residence of a naturalized United States citizen in a foreign country alone was not sufficient evidence of expatriation, although protracted residence abroad raised a presumption of abandonment of citizenship. In an opinion rendered for President Grant in 1873, Secretary of State Fish expressed the view that a naturalized citizen who resided abroad for any legitimate purpose would not lose his citizenship "if he does so sincerely and *bona fide animo revertendi*, and does nothing inconsistent with his pre-existing allegiance. . . ."⁵⁸ Fish asserted, however, that if a naturalized citizen moved abroad and settled there, "and avows his purpose not to return, he has placed himself in the position where his country has the right to presume that he has made his election of expatriation."⁵⁹

Making an oath of allegiance to a foreign sovereign or state that contained no renunciation of United States citizenship and did not have the effect of naturalizing the citizen in a foreign state was held not to constitute an expatriative act.⁶⁰ However, a citizen who made an oath of allegiance to support the Constitution and Laws of the Hawaiian Islands and bear true allegiance to its King, but did not expressly renounce allegiance to the United States, was held to manifest an intention of abandoning American citizenship. "The oath is inconsistent with his allegiance to the United States."⁶¹

With respect to the effect on the citizenship of an American woman who married an alien, the Department maintained a consistent position, as Secretary of State Blaine explained to the American

57. *Id.*

58. F. VAN DYNE, *CITIZENSHIP OF THE UNITED STATES* 273 ("Secretary Fish to the President, For. Rel. 1873, pt. 2, pp. 1188, 1189.")

59. *Id.* at 273-74.

60. III J. MOORE, *supra* note 16, § 468, at 722 ("Mr. Fish, Sec. of State, to Mr. Whiting (a minister who made the oath simply in order to qualify as pastor of a church in Canada) March 6, 1873, 98 MS Dom. Let. 74").

Similarly, making a simple oath to the British Queen in order to qualify as a public school teacher in Canada was held not to interfere with the citizen's citizenship. *Id.* ("Mr. John Davis, Act. Sec. of State to Mr. Barnett, consul at Paramaribo, August 20, 1884, 111 MS. Inst. Consuls. 413").

61. *Id.* at 727 ("Mr. Gresham, Sec. of State, to Mr. Willis, Min. to Hawaii, April 5, 1895, For. Rel. 1895, II, 853").

Minister to Germany in 1890:

The view has been taken by this Department in several cases that the marriage of an American woman to a foreigner does not completely divest her of her original nationality. Her citizenship is held for most purposes to be in abeyance during coverture, but to be susceptible of revival by her return to the jurisdiction and allegiance of the United States.⁶²

Generally, accepting public office under a foreign government was held not to constitute expatriation.

As to the mere tenure of office under the Samoan government, the Department is of opinion that such tenure of office, unless it required the assumption of Samoan citizenship, could not of itself be treated as an act of expatriation, as there is nothing in the Constitution or laws of the United States that precludes a private citizen of the United States from rendering official services to foreign governments.⁶³

Responding to the request of the United States Minister to Mexico for guidance as to whether an American citizen who had served in the Mexican army was entitled to diplomatic protection, Secretary of State Bayard said in 1888: "[A]s a general rule it may be maintained that the mere fact of entering into a foreign military service does not divest. . . nationality."⁶⁴

E. Congress Finally Accepts the Need for Expatriation Legislation

Prior to 1907, bills had been introduced in Congress on several occasions, notably in 1794, 1797, 1818 and 1868, to enact laws which would describe certain acts as expatriative. On each occasion Congress considered but rejected even bills that were concerned with recognizing the right of voluntary expatriations and with providing

62. *Id.* § 408, at 454 ("Mr. Blaine, Sec. of State, to Mr. Phelps, Min. to Germany, Feb. 1, 1890, For. Rel. 1890, 301"). See, to the same effect, *id.* ("Mr. Evarts, Sec. of State, to Mrs. Wood, Sept. 24, 1880, 134 Ms. Dom. Let. 455").

63. *Id.* § 468, at 718 ("Mr. Rives, Assist. Sec. of State, to Mr. Sewall, Consul-General at Apia, No. 28, Jan. 6, 1888, 123 MS Inst. Consuls, 532").

64. *Id.* § 469, at 734 ("Mr. Bayard, Sec. of State, to Mr. Whitehouse, Charge at Mexico, No. 166, Nov. 14, 1888, MS. Inst. Mexico, XXII, 300").

See, to the same effect, Secretary of State Hay, who stated in 1899 in the case of an American citizen businessman in Nicaragua who accepted a commission in the Nicaraguan army to aid in the suppression of a rebellion that:

[T]here is no statutory provision determining the circumstances under which a citizen of the United States may forfeit his nationality. Should the circumstances of a citizen's accepting military or civil office under a foreign government make him, under the law of the foreign country, a citizen thereof, the act would be deemed a voluntary abandonment of his American status and an assumption of another allegiance.

Id. § 469, at 735 ("Mr. Hay, Sec. of State, to Mr. Turley, April 6, 1899, 236 MS. Dom. Let. 186").

the means to exercise that right.⁶⁵ Bills were defeated in 1797 because "many members of Congress still adhered to the English doctrine of perpetual allegiance and doubted whether a citizen could even voluntarily renounce his citizenship."⁶⁶

The bill introduced in 1818, by which time "almost no one doubted the existence of the right of voluntary expatriation," proposed a method by which one might voluntarily relinquish citizenship.⁶⁷ It too was defeated, however, its opponents arguing that Congress had no express or implied authority to provide that a certain act would constitute expatriation.⁶⁸

Several of the expatriation bills introduced in 1868 imposed expatriation for commission of certain acts. "With little discussion, these proposals were defeated."⁶⁹ The debate on another bill, which provided merely a means by which a citizen might voluntarily renounce citizenship is of particular interest, for "even [this] proposal, which went no further than to provide a means of evidencing a citizen's intent to renounce his citizenship, was defeated."⁷⁰ Thus Congress did not provide a means of expatriation because, as the Chairman of the House Committee on Foreign Affairs put it, expatriation was a subject which "ought not to be legislated upon. . . . [T]his comes within the scope and character of natural rights which no Government has the right to control and which no Government can confer. And wherever this subject is alluded to in the Constitution . . . it is in the declaration that Congress shall have no power whatever to legislate upon these matters."⁷¹

The Act which was passed after the debate on expatriation, the Act of July 27, 1868, simply recognized that expatriation was a natural and inherent right of all people.⁷²

Nearly forty years passed before Congress again considered expatriation legislation. Shortly after the turn of the century, Congress

65. See *Afeyim v. Rusk*, 387 U.S. 253, 257 (1967). The Court cited these earlier failed attempts to legislate on expatriation in support of its conclusion that Congress has no power to prescribe loss of citizenship, absent the consent of the citizen. As the Court put it,

even before the adoption of the Fourteenth Amendment, views were expressed in Congress and by this Court that under the Constitution the Government has granted no power, even under its express power to pass a uniform rule of naturalization, to determine what conduct should and should not result in the loss of citizenship.

Id.

66. 387 U.S. at 258 (*citing* 4 ANNALS OF CONG. 1005, 1027-30 (1794); 7 ANNALS OF CONG. 349 et seq. (1797)).

67. 387 U.S. at 258.

68. *Id.*

69. *Id.*

70. *Id.* at 265 (*citing* CONG. GLOBE, 40th Cong., 2d Sess. 2317 (1868)).

71. *Id.* at n.20 (*citing* CONG. GLOBE, 40th Cong., 2d Sess. 2316 (1868)).

72. See *supra* text accompanying notes 30 and 31.

decided that the time had come to prescribe what acts would constitute expatriation, as Presidents from Grant through Roosevelt had urged it to do. In his annual message to Congress in 1904, President Roosevelt put it to Congress that United States laws relating to citizenship "ought also to be made the subject of scientific inquiry with a view to probable further legislation. By what acts expatriation may be assumed to have been accomplished," he stated, was a question "of serious import, involving personal rights and often producing friction between this Government and foreign governments. Yet upon [this question] our laws are silent."⁷³

As the United States entered the 20th century, there was general recognition that the times had changed; a genuine need for expatriation legislation had arisen. Surveying earlier efforts to enact legislation on expatriation, the Citizenship Board established by Secretary of State Root in 1906 to inquire into the laws and practice regarding citizenship, expatriation, and protection of citizens abroad, offered this explanation of the need for Congress to act:

[T]he class of Americans who separate themselves from the United States and live within the jurisdiction of foreign countries is becoming larger each year, and the question of their protection causes increasing embarrassment to this Government in its relations with foreign powers.

Immigration to the United States has of recent years reached proportions hitherto unheard of, and many of these immigrants will become naturalized citizens of the United States. Naturalized citizens are more apt to go abroad than native citizens. Having already changed their domicile, they are more apt to change it again. . . . One reason why the attempts which have been made in the past to secure a legislative definition of expatriation have failed is undoubtedly because the necessity has been slight in comparison with the necessity which now exists.⁷⁴

In April 1906, the Senate passed and sent to the House a joint resolution which provided that a commission should be established "to examine into the subjects of citizenship, expatriation and protection abroad," and make a report to be referred to Congress for its consideration.⁷⁵ In reporting out the joint resolution, the House Committee on Foreign Affairs asserted: "Legislation is required to settle some of the embarrassing questions that arise in reference to citizenship, expatriation, and the protection of American citizens

73. Annual Message to Congress, Dec. 6, 1904. IX MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 44 at 6917.

74. "Report on the Subject of Citizenship, Expatriation and Protection Abroad," Prepared by the Board appointed by Secretary of State Root in July 1906 to study those matters. H.R. Doc. No. 326, 59th Cong., 2d Sess. 25 (1906).

75. *Id.*, referring to S. Res. 30, 59th Cong., 1st Sess. (1906).

abroad.”⁷⁶ Acknowledging the leading role of the Department of State in such matters, the House committee stated: “We should be glad if the Secretary of State would select some gentlemen connected with the State Department who have given special attention to these subjects, have them prepare a report and propose legislation that could be considered by Congress at the next session.”⁷⁷

The Secretary of State on December 18, 1906 submitted to the Speaker of the House of Representatives the report of the Citizenship Board. The report, which Secretary Root described in his transmittal letter as “a very clear and thorough exposition of this most important subject,” contained recommendations which by and large reflected the tests and criteria the Department of State had applied over the years to determine whether expatriation had taken place. Congress began consideration of the recommendations of the Board early in 1907, and after brief debate passed a bill which became the Act of March 2, 1907.⁷⁸ Members did not express any views that expatriation was not a proper subject on which Congress might legislate. However, during the very brief debate in the House of Representatives (there was virtually no floor debate in the Senate), some members expressed concern about the bill’s provision that naturalized citizens who resided abroad would be presumed to intend to expatriate themselves. That provision, it was observed, was in conflict with the Constitution which makes no difference between native-born and naturalized citizens.⁷⁹

F. The Act of March 2, 1907

The expatriative provisions of the Act of March 2, 1907 generally incorporated the Board’s recommendations and were embodied in sections 2 and 3. They read as follows:

Sec. 2 That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign State.

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided also, That no American citizen shall be

76. HOUSE COMM. on Foreign Aff., H.R. REP. NO. 4784, 59th Cong., 1st Sess. 1 (1906).

77. *Id.*

78. 34 Stat. 1228 (1907) (repealed by Nationality Act of Oct. 14, 1940, 8 U.S.C § 17).

79. 41 CONG. REC. 1464-67 (1907).

allowed to expatriate himself when this country is at war.⁸⁰

Sec. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relations she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.⁸¹

The Act of March 2, 1907, which provided "the necessary legislative definition" of the means of expatriation, "put an end to the long circuit of doubt and uncertainty over the question of expatriation."⁸² No longer would the Department of State act or be required to act beyond its legal competence in making determinations of loss of nationality.

G. *The Catalog of Expatriative Acts Grows Longer*

As the United States became more deeply involved in the world after 1907, American citizens, native-born and naturalized, went abroad in increasing numbers to live, work, and study. In both the executive and legislative branches there was sentiment that certain acts in addition to those prescribed in the Act of March 2, 1907 should be included so as to ensure that the conduct of American citizens would not lead to disputes and embarrassment in the conduct of foreign relations. This concern was manifested in the Nationality Act of 1940.⁸³ The list of expatriative acts in the Act of March 2, 1907 was lengthened considerably. In the new Act, in addition to

80. The State Department board recommended that the provisions of the second paragraph of section 2 should apply to all United States citizens, although it recognized that naturalized citizens were more likely to go abroad and remain abroad than natural born citizens.

The American Minister to Germany sent the following report to the Secretary of State in 1900. It is a fairly typical observation by diplomatic officers of the time about the attitude of naturalized citizens who settled abroad.

Hardly a day passes that there do not come to this embassy persons who have made the briefest possible stay in the United States and demand passports clearly for the purpose of passing their lives here free from all obligations either to the country of their birth or of their adoption. Many of these have not the slightest appreciation of their real rights or duties as Americans, have no feelings in common with those of American citizens, and some are not even able to write or speak the English language.

III J. MOORE, *supra* note 16 at § 393, at 402-03 ("Mr. White, American amb. to Germany, to Mr. Hay, Sec. of State, April 21, 1900, For. Rel. 1900, 25-26").

81. Section 3 was repealed by the Act of Sept. 22, 1922, ch. 411, 42 Stat. 1021 (note inserted by author).

82. T. TSIANG, *EXPECTATIONS*, *supra* note 21, at 109.

83. Nationality Act of 1940, ch. 876, tit. I, § 1, 54 Stat. 1137 (codified at 8 U.S.C. § 907, *repealed by* ch. 477, title IV, § 403(a)(42, 66 Stat. 280, eff. Dec. 24, 1952).

naturalization in a foreign state, provision was made for loss of citizenship for taking an oath of allegiance to a foreign state; entering the armed forces of a foreign state; holding public office in a foreign state; voting in a foreign political election; formally renouncing citizenship; deserting the United States armed forces in wartime; committing treason; and formally renouncing citizenship in the United States in wartime.⁸⁴ The provisions of the act of March 2, 1907 regarding loss of citizenship by naturalized citizens were tightened.⁸⁵ The rebuttable presumption of the earlier Act was not incorporated in the Nationality Act of 1940. The rationale for the stringent provisions regarding naturalized citizens given by the Cabinet Committee appointed to review the Nationality laws when it made its report to President Roosevelt in 1938 was that:

. . . The admission of an alien to the privilege of American citizenship is subject to the condition that he intends to reside permanently in the United States and perform the duties of citizenship. When a naturalized citizen abandons his residence in the United States and takes up residence in the state of which he was formerly a national, definite termination of his American citizenship should follow.⁸⁶

How does one account for the lengthening of the list of acts that would work expatriation? First, as President Roosevelt noted in his message to the Congress in 1938 transmitting the report of the Cabinet Committee, it was considered desirable "from [an] administrative standpoint [to] hav[e] the existing nationality laws now scattered among a large number of separate statutes embodied in a single, logically arranged and understandable code."⁸⁷ The greatly expanded list of expatriative acts might also be explained, it has been pointed out, by the fact that the Nationality Act of 1940 was drafted in a time of economic stress and increasing security consciousness as a result of the beginning of World War II, and that it reflected the post-World War I attitude in America that stricter requirements should be imposed for acquisition and retention of United States citizenship.⁸⁸

The Immigration and Nationality Act of 1952, a product of the post-war climate, the Cold War and hyper-security consciousness,⁸⁹ incorporated most of the expatriative provisions of the Nationality Act of 1940.⁹⁰

84. *Id.* at §§ 401(a)-(h), 54 Stat. 1168-69.

85. *Id.* at 1170, § 404.

86. CABINET COMMITTEE, 76TH CONG. 1ST SESS., A REPORT PROPOSING A REVISION OF THE NATIONALITY LAWS OF THE UNITED STATES 69 (House Comm. Print 1939).

87. *Id.* at iii.

88. Duvall, *Expatriation under United States Law*, Perez to Afroyim: *The Search for a Philosophy of American Citizenship*, 56 VA. L. REV., 408, 416 (1970).

89. *Id.*

90. INA § 349(a), 66 Stat. 163, 267-68 (1952) (codified at 8 U.S.C. § 1481(a) and amended by the Expatriation Act of 1954, ch. 1256, 68 Stat. 1146).

H. Constitutional Rulings Shorten the List of Expatriative Acts

An important challenge to the Nationality Act of 1940, the Immigration and Nationality Act of 1952, and the general power of Congress to prescribe what acts constitute expatriation was mounted in *Perez v. Brownell*, but rejected by the Supreme Court.⁹¹ In holding that Congress might prescribe loss of citizenship for voting in a foreign election, the Court declared that withdrawal of citizenship was reasonably calculated to effect an end that is within the power of Congress to achieve—avoidance of embarrassment in the conduct of the foreign relations of the United States.⁹² As Justice Frankfurter, who delivered the opinion of a divided (5 to 4) Court, bluntly put it: "The termination of citizenship terminates the problem."⁹³

In decisions rendered between 1958 and 1967, the Court dramatically shortened the list of expatriative acts by declaring constitutionally infirm statutory expatriative provisions relating to: desertion from the armed forces;⁹⁴ departing or remaining outside the United States to avoid military service;⁹⁵ foreign residence by naturalized citizens;⁹⁶ and voting in a foreign political election.⁹⁷ Nonetheless, the list of acts which may result in loss of United States citizenship remains a long one relative to the laws of other democratic nations,

91. 356 U.S. 44 (1958), *overruled*, 387 U.S. 253, 268 (1967).

92. *Id.* at 60-62.

93. *Id.* at 60.

94. *Trop v. Dulles*, 356 U.S. 86 (1958).

95. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

96. *Schneider v. Rusk*, 377 U.S. 163 (1964).

The Court repudiated long held positions of the executive and legislative branches regarding loss of citizenship by naturalized citizens. In language reminiscent of the opinion of Attorney General Black in 1859 championing the rights of naturalized citizens (see *supra* note 31), the Court disposed once and for all of the proposition that naturalized citizens should be set apart from native-born citizens.

This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make. Moreover, while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' *Bolling v. Sharpe*, 347 U.S. 497, 499. A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance.

Schneider, 377 U.S. at 168-69.

97. *Afroyim v. Rusk*, 387 U.S. 253 (1967). See *infra* text accompanying note 124.

particularly states with values we share, such as the United Kingdom and Canada, whose laws provide essentially one principal ground for loss of nationality—formal renunciation of citizenship.⁹⁸

III. CONSISTENT ELEMENTS OF A DETERMINATION OF EXPATRIATION

The Immigration and Nationality Act of 1952, as amended in 1986, prescribes that citizenship shall not be lost unless it is proved that an American citizen voluntarily performed a valid statutory expatriative act with the intention of relinquishing citizenship.⁹⁹ In loss of nationality proceedings, the government bears the burden to prove all of the foregoing three elements. With respect to the issue of whether the act was performed voluntarily, however, the government benefits from a rebuttable presumption that one who performs an expatriative act does so voluntarily.¹⁰⁰

98. The British Nationality Act of 1981, ch. 61, provides that British nationality shall be lost by formal renunciation or as a consequence of fraudulent naturalization. A class of British citizens, but a very limited one, may lose nationality by obtaining another citizenship.

The Canadian Citizenship Act prescribes that loss of Canadian citizenship shall result only from formal renunciation or obtaining naturalization fraudulently. Citizenship Act, CAN. REV. STAT. ch. C-29 (1985).

99. INA § 349(a), 8 U.S.C. § 1481(a) (1988) (as amended by Immigration & Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655, 3658) provides that:

A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality —

The acts, stated summarily, are:

- (1) obtaining naturalization in a foreign state;
- (2) swearing an oath of allegiance to a foreign state;
- (3) serving in the armed forces of a foreign state;
- (4) serving in the government of a foreign state;
- (5) making a formal renunciation of United States nationality;
- (6) making a formal renunciation of United States nationality in the United States in wartime with the approval of the Attorney General; and
- (7) committing treason against the United States.

The Supreme Court has consistently and expressly held that only voluntary acts work expatriation. *See* *Vance v. Terrazas*, 444 U.S. 252 (1980); *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Perez v. Brownell*, 356 U.S. 22 (1958); *Nishikawa v. Dulles*, 356 U.S. 129 (1958); *Perkins v. Elg*, 307 U.S. 325 (1939); *Mackenzie v. Hare*, 239 U.S. 299 (1915).

The Amendments of 1986 brought the INA into line with rulings of the Supreme Court in *Afroyim* and *Terrazas* that loss of citizenship depends on whether the citizen intended to relinquish citizenship. *See infra* part III.

100. INA § 349(b), 8 U.S.C. § 1481(b) provides that:

(b) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the provisions of this chapter or any other act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a pre-

A. *Voluntariness—The Immemorial Prerequisite to Expatriation*

When Henry James expatriated himself in 1915, the Department of State bore no burden under either the Act of March 2, 1907 or case law to establish that a person who performed an expatriative act had done so voluntarily. Nonetheless, it had long been accepted that only uncoerced acts would work expatriation. The notion that expatriation can only result from voluntary action is inherent in the Act of July 27, 1868, "An Act Concerning the Rights of American Citizens in Foreign States."¹⁰¹ Attorney General Williams made it clear in the opinion he prepared for President Grant in 1873 that expatriation depends on a free will act.¹⁰² "[I]f [a] citizen emigrates to a foreign country," he wrote,

and there, in the mode provided by its laws, or in any other solemn and public manner, renounces his United States citizenship, and makes a voluntary submission to its authorities with a *bona fide* intent of becoming a citizen or subject there, I think that the Government of the United States should not regard this procedure otherwise than as an act of expatriation.¹⁰³

After 1868, in ruling on whether a citizen expatriated himself by performing in a foreign state an act inconsistent with United States citizenship, Secretaries of State left no doubt that only voluntary acts would result in the loss of citizenship. Thus Secretary of State Bayard stated in 1888:

This Government maintains that naturalization is a voluntary act, not to be imputed or determined by construction, but to be affirmatively performed by the individual. While it does not deny that a citizen may voluntarily divest himself of his allegiance and acquire a new one, and while it also recognizes that there are certain specific acts which he may perform in a foreign state, and which in themselves are tantamount to a voluntary and open renunciation of his former nationality or allegiance, yet manifestly the allegation of the Mexican Government in Mr. Sherwell's case is not of this nature.¹⁰⁴

While acknowledging that only voluntary acts could work expatriation, the Department held that any citizen who alleged that he acted under duress when he performed an expatriative act should bear the burden of proof, for it was presumed that if he acted wittingly, he acted voluntarily. In taking this position, the Department simply

ponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

101. See *supra* note 34 and accompanying text.

102. 14 Op. Att'y Gen. 295 (1873). See *supra* note 48.

103. *Id.* at 296.

104. III J. MOORE, *supra* note 16 at § 469, 733-34 ("Mr. Bayard, Sec. of State, to Mr. Whitehouse, charge at Mexico, No. 166, Nov. 14, 1888, Ms. Inst. Mexico, XXII. 300").

followed the common law rule that consciously performed acts are presumed to be voluntary.¹⁰⁵

In the digests of the opinions of the Secretaries of State prior to 1907 it is rare to find reports of cases where the Secretary determined that the citizen acted involuntarily.¹⁰⁶ Why this was so — one can only speculate. Perhaps those American citizens who went abroad in the last third of the 19th century and the early years of the 20th (in contrast to many Americans who went abroad in the 1930s and 1940s) rarely found themselves in circumstances where they were forced to jeopardize American citizenship by performing an expatriative act in order to avert a threat to their lives, livelihood, or freedom. It would not seem unreasonable to assume that if, before World War I, a citizen voluntarily left the United States, settled in a foreign state and set up a business there, it was rather unlikely that he could establish, or would try to establish, that he acted involuntarily if, say, he subsequently obtained naturalization in that state.

The Act of March 2, 1907 was silent on whether expatriation depended upon performance of a voluntary expatriative act. The Department of State, however, assumed from the first that such was the intent of Congress. As Secretary of State Knox declared in 1910 in an instruction to the United States Minister to Portugal regarding the case of an American citizen who made an oath of allegiance to Portugal:

If he was forced by officials in Azores to swear allegiance to Portugal, it cannot be considered that he has expatriated himself under the provisions of the first paragraph of Section 2 of the expatriation act of March 2, 1907.¹⁰⁷

In December 1915, six months after Henry James expatriated himself, the Supreme Court addressed the issue whether expatriation depended upon the voluntary action of the citizen. In *Mackenzie v. Hare*, the first case to rule on the power of Congress to enact expatriative legislation, the Court upheld the constitutionality of section 3 of the Act of March 2, 1907, which provided that an American woman would lose her nationality upon marrying an alien.¹⁰⁸ Address-

105. See *Towson v. Moore*, 173 U.S. 17 (1899); *Savage v. United States*, 92 U.S. 382 (1875); and *Mason v. United States*, 84 U.S. 67 (1872).

Under the provisions of section 349(b) of the INA, 8 U.S.C. § 1481(b), a person who performs a statutory expatriating act is presumed to have acted voluntarily, but the presumption may be rebutted upon a showing by a preponderance of the evidence that the act was not voluntary. See *supra* note 96.

106. III J. MOORE, *supra* note 116 at § 431-83; and F. VAN DYNE, *CITIZENSHIP OF THE UNITED STATES* (1904).

107. II C. HYDE, *INTERNATIONAL LAW* § 383 at 1160 n.3 (1945) ("For. Rel. 1910, p. 832").

108. 239 U.S. 299 (1915).

Mrs. Mackenzie, a native-born American citizen, married a British subject and resided with him in the United States. Thereafter, the Board of Elections of San Francisco refused to register her as a voter on grounds that she expatriated herself under section 3 of

ing the issue of voluntariness, the Court declared: "It may be conceded that a change of citizenship cannot be arbitrarily imposed," but noted that "[t]he law in controversy does not have that feature."¹⁰⁹ In the Court's judgment, Mrs. Mackenzie freely elected to contract marriage with an alien, and thus knowingly brought herself within the purview of the law. "It [the Act of March 2, 1907] deals with a condition voluntarily entered into, with notice of the consequences," the Court said.¹¹⁰

After the enactment of the Act of March 2, 1907, some citizens who performed an expatriative act maintained that they did not do so freely, but usually they were not able to convince the Department of State that they should not be expatriated. As one commentator has written:

Not infrequently during World War I, before the United States became a belligerent, American citizens took oaths of allegiance to foreign States under circumstances which, according to the subsequent contentions of the individuals concerned, savored of duress. Such persons usually experienced difficulty, however, in convincing the Department of State that their action had been in fact involuntary.¹¹¹

The difficulty such persons experienced is prevailing undoubtedly was due in part to the fact that consular regulations placed a heavy burden of proof on those who alleged that they performed the act under duress.¹¹²

the Act of March 2, 1907 by marrying a foreign national. *See supra* text accompanying note 77. She prosecuted a writ of mandamus in state court. After losing below, she appealed to the Supreme Court, contending that section 3 was unconstitutional since it was beyond the power of Congress to enact.

109. *Id.* at 311. Section 3 was repealed in 1922. *See supra* note 77.

110. *Id.* at 311-12.

See also Ex Parte Griffin, 237 Fed. 445 (N.D.N.Y. 1916). There the court held that an American citizen who made an oath of allegiance to King George the Fifth upon enlisting in the Canadian Army acted voluntarily (although he contended he was drunk at the time), and thus expatriated himself under section 2 of the Act of March 2, 1907.

And see Perkins v. Elg, 307 U.S. 325, 343 (1939), where the Supreme Court again construed the Act of March 2, 1907. Speaking for the Court, Chief Justice Hughes said that: "We think that the statute was aimed at a voluntary expatriation," and noted that the classic definition of expatriation is: "The voluntary renunciation or abandonment of nationality and allegiance." *Id.* at 334. *See Van Dyne, supra* note 102, at 269.

111. *II C. HYDE, supra* note 103 at § 383 p. 1160-61 n.3.

112. *Id.*

Regulations promulgated in 1930, for example, prescribed that:

Where it is alleged that a foreign oath of allegiance was taken under duress, the burden of proof should be placed upon the person asserting duress to establish that fact to the satisfaction of the Department. The mere statement of the person concerned will not be accepted as proof of the allegation that the oath was taken under duress. The best evidence of the existence of duress would ordinarily be some statement made contemporaneously with or immediately

With the rise of fascism in Europe and Japan, World War II, and in the war's chaotic aftermath, American citizens, frequently dual nationals who had returned or had been taken by their parents to the country of their birth, found themselves in perilous situations. In order to protect their and their family's lives or livelihoods, they performed a statutory expatriating act: obtained foreign naturalization; allowed themselves to be conscripted into the armed forces of the enemy; or accepted employment in a foreign government. Many later instituted actions in federal court under the provisions of the Nationality Act of 1940 or the Immigration and Nationality Act of 1952 to be declared United States citizens.¹¹³ Quite a few prevailed by convincing the Courts that they had no reasonable alternative to performing the expatriative act.

In recent years the issue of voluntariness has lost importance in most loss of nationality proceedings, be they administrative or judicial. Americans now living abroad rarely perform an expatriative act under conditions that threaten life, liberty, or the ability to subsist. As a consequence of the 1967 Supreme Court's decision in *Afroyim v. Rusk*, holding that expatriation depends upon assent of the citizen, and the Court's affirmation and clarification of *Afroyim* in 1980 in *Vance v. Terrazas*, the issue principally pleaded and decided on appeal has been whether one who performed an expatriative act intended to relinquish citizenship.¹¹⁴ Since 1967 there have been no

preceding the taking of the oath, showing that the person had asserted his American citizenship and had protested against being required to enter the service of, or swearing allegiance to, the foreign country. Such statement may consist of records of the military or other authorities of the foreign governments or statements communicated by the person in question to an American consulate or diplomatic mission requesting assistance in avoiding service in a foreign army on the ground that he is an American citizen.

Id. ("Consular Regulations of the United States, Section 144, Note 2, as of August 1930").

113. Section 360 of the INA, 8 U.S.C. § 1503 provides that one who has been held to have been expatriated may institute a suit for a judgment declaring him or her to be a United States citizen. Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 1172, had an analogous provision.

Of the war time and post-war cases, one authority has observed: "the Courts have been very generous in accepting pleas of coercion, finding it present when the citizen's actions were compelled by fear of injury, retaliation, imprisonment, fine, economic deprivation." Gordon, *The Citizen and the State: Power of Congress to Expatriate American Citizens*, 53 GEO. L.J., 315, 340 (1964).

Gordon cites the following authority for his observation:

Nishikawa v. Dulles, 356 U.S. 129 (1958) (conscription in totalitarian country); *Stipa v. Dulles*, 233 F.2d 551 (3d Cir. 1956) (foreign government employment induced by economic duress); *Soccadato v. Dulles*, 96 U.S. App. D.C. 337, 266 F.2d 243 (1955) (voting induced by fear and intimidation); *Acheson v. Murakami*, 176 F.2d 953 (9th Cir. 1949) (renunciation in relocation camp for Japanese, induced by mental fear and intimidation); *Doreau v. Marshall*, 170 F.2d 721 (3d Cir. 1948) (acceptance of Vichy citizenship induced by fear).

114. *Vance v. Terrazas*, 444 U.S. 252 (1980); *Afroyim v. Rusk*, 387 U.S. 253 (1967). See *infra* part III.

reported federal cases where a citizenship-claimant prevailed by arguing that the expatriative act was done under duress. Of the more than 200 decisions rendered on the merits since 1980 by the State Department's Board of Appellate Review, fewer than twenty were decided on the grounds that the appellant was subjected to duress. Where duress was established, it usually consisted of parental or filial pressure or pressure by one in authority over the appellant.¹¹⁵ Two appeals were decided on the grounds that the appellant was deemed incompetent to perform a voluntary expatriative act.¹¹⁶

B. *Intent to Relinquish Citizenship*

In the half century from 1915, when the Supreme Court began to review statutory loss of nationality cases, to 1967, when it decided *Afroyim v. Rusk*, the Court firmly rejected arguments that loss of citizenship depended upon whether the citizen assented to loss, that is, whether he intended to terminate citizenship. In so holding, the Court gave priority to the power of Congress to prescribe expatriation as a deterrent to conduct that might cause the government embarrassment or difficulties in the conduct of the nation's foreign relations.

1. *Mackenzie v. Hare and its Progeny—Is the Requirement of Intent of the Citizen to Retain or Relinquish Citizenship a Gross Fiction?*

In 1915 the Supreme Court heard arguments by the plaintiff, Mrs. Mackenzie, that Congress has no power under the Constitution to abridge the right of citizenship without the citizen's concurrence.¹¹⁷ Section 3 of the Act of March 2, 1907 was invalid, she submitted, for the citizenship of affected persons like herself was an incident of their birth in the United States and under the Constitution it became a right, privilege and immunity which could not be taken away except as a punishment for a crime or for voluntary expatriation.¹¹⁸ "Expatriation" appellant maintained, "is evidenced only by emigration, coupled with other acts indicating an intention to transfer one's allegiance." And all the acts must be voluntary,

115. See, e.g., *In re T.A.H.*, Jan 23, 1990; *In re M.L.*, Oct. 23, 1989; *In re H.H.L.*, Aug. 8, 1985.

116. See *In re C.-S.S.*, Apr. 3, 1990; *In re G.B.-S.*, Jul. 14, 1983.

117. *Mackenzie v. Hare*, 239 U.S. 299 (1915).

118. *Id.* at 308.

“the result of a fixed determination to change the domicile and permanently reside elsewhere, as well as to throw off the former allegiance, and become a citizen or subject of a foreign power.”¹¹⁹

The Court summarily rejected Mrs. Mackenzie’s thesis, declaring that her “contention is in exact antagonism to the statute.”¹²⁰ The Court made it clear that it considered the interest of the state in efficient management of foreign relations superior to the personal interests or rights of the plaintiff.

We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and in her earnest assertion of it. But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. And this is an answer to the apprehension of counsel that our construction of the legislation will make every act, though lawful, as marriage, of course, is, a renunciation of citizenship. The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. It is as voluntary and distinctive as expatriation and its consequence must be considered as elected.¹²¹

In 1950, the Supreme Court affirmed its earlier position that a citizen’s intent when an expatriative act is performed is irrelevant. In *Savorgnan v. United States*,¹²² the plaintiff, Mrs. Savorgnan argued that she did not expatriate herself when she obtained naturalization in Italy because she had no intention of endangering her American citizenship or renouncing her allegiance to the United States.¹²³ Rejecting that contention, the Supreme Court declared: “There is no suggestion in the statutory language [the Act of March 2, 1907 and the Nationality Act of 1940] that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.”¹²⁴ Noting that the United States had long recognized the general undesirability of dual allegiances, the Court stated that there was nothing in the Act of March 2, 1907 that

implies a congressional intent that, after an American citizen has performed an overt act which spells expatriation under the wording of the statute, he, nevertheless, can preserve for himself a duality of citizenship by showing his intent or understanding to have been contrary to the usual legal consequences of such an act.¹²⁵

119. *Id.* at 310.

120. *Id.*

121. *Id.* at 312.

122. 338 U.S. 491 (1950).

123. *Id.* at 495.

124. *Id.* at 499-500.

125. *Id.* at 500.

In 1958, *stare decisis* prevailed yet again when the Supreme Court denied contentions that Congress lacked authority to terminate a citizen's citizenship without that person's consent. In *Perez v. Brownell*, a 5 to 4 decision, Justice Frankfurter, avatar of judicial restraint, delivered the opinion of the Court. He confirmed that under the applicable statute, as indeed under U.S. public policy since the Bancroft treaties, expatriation was automatic for specified voluntary conduct, without regard to the intent of the actor.¹²⁶ "Of course, Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily," he noted.¹²⁷ Continuing, he pointed out that the plaintiffs in *Mackenzie v. Hare* and *Savorgnan v. United States*

voluntarily [engaged] in conduct to which acts of Congress attached the consequence of denationalization irrespective of—and, in those cases, absolutely contrary to—the intentions and desires of the individuals. Those two cases mean nothing—indeed, they are deceptive—if their essential significance is not rejection of the notion that the power of Congress to terminate citizenship depends upon the citizen's assent. It is a distortion of those cases to explain them away on a theory that a citizen's assent to denationalization may be inferred from his having engaged in conduct that amounts to an 'abandonment of citizenship' or a 'transfer of allegiance.' Certainly an Act of Congress cannot be invalidated by resting decisive precedents on a gross fiction—a fiction baseless in law and contradicted by the facts of the cases.¹²⁸

2. *Afroyim v. Rusk: The Right to Remain a Citizen unless Citizenship is Voluntarily Relinquished*

Half a century after Henry James expatriated himself, the Supreme Court decided *Afroyim v. Rusk*.¹²⁹ The Court repudiated the proposition that Congress has a constitutional power to prescribe expatriation for performance of acts likely to encumber the smooth conduct of foreign relations, regardless of the intent of the citizen who performs such acts.

By 1967 the time was propitious for the Court to construe the Constitution anew with respect to the right of citizenship, to reexamine "the great immunities with which it surrounds the individual."¹³⁰ In the years since it had decided *Perez*, the make-up and philosophy

126. *Perez v. Brownell*, 356 U.S. 44, 48 (1958), *overruled*, 387 U.S. 253 (1967).

127. *Id.* at 61.

128. *Id.* at 61-62. The Court accordingly affirmed the loss of citizenship of one who performed the statutorily proscribed act of voting in a foreign political election, although he did not intend to divest himself of citizenship.

129. 387 U.S. 253 (1967).

130. B. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 76 (1921).

of the Court had changed markedly. As has been aptly observed, the Supreme Court under Chief Justice Warren "came to be, for much of the time, the branch of government in which the libertarian, egalitarian, and humanitarian impulses beat the strongest."¹³¹ Of the five justices who upheld loss of the petitioner's citizenship in *Perez*, Justices Burton and Frankfurter were no longer on the Court, and Justice Brennan, who in 1963 expressed "some felt doubts about the correctness of *Perez*," had gone over to the position of the *Perez* dissenters.¹³²

The *Afroyim* Court was influenced by the fact that "*Perez* [had] been a source of controversy" ever since it was decided, and that "in the other cases decided with and since *Perez*, [the] Court [had] consistently invalidated on a case-by-case basis various other statutory sections providing for involuntary expatriation."¹³³ These cases, as well as many commentators, the Court said, cast great doubt upon the soundness of *Perez*.¹³⁴ Furthermore, the dissent of Chief Justice Warren in *Perez* was a powerful organon for the Court.¹³⁵ The problem whether forfeiture of citizenship for voting in a foreign political election exceeds the bounds of the Constitution is fundamental, the Chief Justice had maintained in *Perez*, "and must be resolved upon fundamental considerations."¹³⁶ The Citizenship Clause of the Fourteenth Amendment to the Constitution should be construed as written, he stated; if it were, it would be apparent that "this priceless right is immune from the exercise of governmental powers."¹³⁷

Justice Black, who delivered the opinion of a divided (5 to 4) Court, framed the issue as the Chief Justice had done in his dissent

131. A. COX, *THE COURT AND THE CONSTITUTION* 354 (1987).

132. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 187 (1963) (Brennan, J., concurring).

Three of the four dissenters in *Perez* (Justice Whittaker left the Court before 1967), Chief Justice Warren, and Justices Black and Douglas, joined Justices Brennan and Fortas to make the majority in *Afroyim*.

133. 387 U.S. at 255.

The cases cited were *Trop v. Dulles*, 356 U.S. 86 (1958); *Nishikawa v. Dulles*, 356 U.S. 129 (1958); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Schneider v. Rusk*, 377 U.S. 163 (1964).

134. *Id.* at 256.

The Court cited the following writings: Agata, *Involuntary Expatriation and Schneider v. Rusk*, 27 U. PITT. L. REV. 1 (1965); Hurst, *Can Congress Take Away Citizenship?*, 29 ROCKY MTN. L. REV. 62 (1956); Kurland, Foreword: *Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 169-75 (1964); Comment, *Constitutional Law—Citizenship—Power of Congress to Effect Involuntary Expatriation*, 56 MICH. L. REV. 1142 (1958); Note, *Forfeiture of Citizenship Through Congressional Enactments*, 21 U. CIN. L. REV. 59 (1952); 40 CORNELL L.Q. 365 (1955); 25 S. CAL. L. REV. 196 (1952). "But," the Court added, "see, e.g., Comment, *The Expatriation Act of 1954*, 64 YALE L.J. 1164 (1955)." 387 U.S. at 256.

135. *Perez*, 356 U.S. at 62-78 (Warren, C.J., dissenting).

136. *Id.* at 63.

137. *Id.* at 77-78.

in *Perez*. "The fundamental issue before this Court here, as it was in *Perez*, is whether Congress can consistently with the Fourteenth Amendment enact a law stripping an American of his citizenship which he has never voluntarily renounced or given up."¹³⁸ That issue could only be determined, Justice Black stated, by a straight-forward construction of the first section of the Fourteenth Amendment to the Constitution which

[p]rovides its own constitutional rule in language calculated completely to control the status of citizenship: 'All persons born or naturalized in the United States. . . are citizens of the United States. . . .' There is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, cancelled, or diluted at the will of the Federal Government, the States, or any other governmental unit.¹³⁹

Continuing, the opinion asserted that to uphold the power of Congress to take away citizenship because one voted in a foreign political election (as the petitioner in the case before the Court had done) "would be equivalent to holding that Congress has the power to 'abridge,' 'affect,' 'restrict the effect of,' and 'take . . . away' citizenship."¹⁴⁰ Justice Black concluded:

138. *Afroyim v. Rusk*, 387 U.S. 253, 256 (1967).

The petitioner was expatriated under section 401(e) of the Nationality Act of 1940, 8 U.S.C. § 801 (1946) for voting in a foreign political election.

139. *Id.* at 262.

140. *Id.* at 267.

Justice Black also drew heavily on the Court's opinion in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). In *Wong Kim Ark*, he noted, the Court held that Congress could do nothing to abridge or affect the petitioner's birthright citizenship. 387 U.S. at 266.

Continuing, Justice Black recalled that the Court in *Wong Kim Ark* cited Chief Justice Marshall's "well-considered and oft-quoted dictum" in *Osborn v. Bank of the United States*, 9 Wheat 738 (1824) that "'Congress has power to confer citizenship, not a power to take it away.'" *Id.* Justice Black then cited the Court's declaration in *Wong Kim Ark* (169 U.S. at 703) that:

Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act . . . of Congress . . . can affect citizenship acquired as a birthright, by virtue of the Constitution itself The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.

Id. Accordingly, Justice Black asserted:

To uphold Congress' power to take away a man's citizenship because he voted in a foreign election in violation of sec. 401(e) would be equivalent to holding

Our holding we think is the only one that can stand in view of the language and the purpose of the Fourteenth Amendment, and our construction of that Amendment, we believe, comports more nearly than *Perez* with the principles of liberty and equal justice to all that the entire Fourteenth Amendment was adopted to guarantee. Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.¹⁴¹

Having concluded that its fifty-year old position was untenable because it plainly was inconsistent with the Constitution, the Court abandoned it and expressly overruled *Perez*.

Justice Harlan, in a dissent marked by his wonted intellectual rigor (and deference to precedent), found the historical evidence adduced by the majority to support its position “wholly inconclusive.”¹⁴² He submitted that “nothing in the history, purposes or language of the [citizenship] clause [of the Fourteenth Amendment] suggests that it forbids Congress in all circumstances to withdraw the citizenship of an unwilling citizen.”¹⁴³ The majority’s error, he asserted acerbly, was that the construction it placed on the Citizenship Clause “rests in the last analysis simply on the Court’s *ipse*

that Congress has the power to ‘abridge,’ ‘affect,’ ‘restrict the effect of,’ and ‘take . . . away’ citizenship.

387 U.S. at 267.

141. *Id.* at 267-68.

The Court’s decision voided section 401(e) of the Nationality Act of 1940 and consequently the analogous provision of INA, § 349(a)(5).

142. *Id.* at 291.

Justice Harlan’s dissent, in which Justices Clark, Stewart and White joined, cited evidence which he said the majority overlooked in concluding that the Citizenship Clause absolutely protects citizenship from Congressional divestment.

While the debate on the Act of 1868 [declaring expatriation to be a natural and inherent right] was still in progress, negotiations were completed on the first of a series of bilateral expatriation treaties [The Bancroft Treaties], which ‘initiated this country’s policy of automatic divestment of citizenship for specified conduct affecting out foreign relations.’ *Perez v. Brownell, supra*, at 48. [356 U.S. 44 (1958)]. Seven such treaties were negotiated in 1868 and 1869 alone; each was ratified by the Senate. If, as the Court now suggests, it was ‘abundantly clear’ to Congress in 1868 that the Citizenship Clause had taken from its hands the power of expatriation, it is quite difficult to understand why these conventions were negotiated, or why, once negotiated, they were not immediately repudiated by the Senate.

Id. at 290-91 (footnotes omitted).

143. *Id.* at 292.

dixit, evincing little more, it is quite apparent, than the present majority's own distaste for the expatriation power."¹⁴⁴ He predicted that the ambiguity of the phrase "voluntary relinquishment" of citizenship would cause only confusion.¹⁴⁵

Whatever the merits of Justice Harlan's criticisms of the Court's reasoning, *Afroyim* was a decision of seismic dimension, one where "the creative element in the judicial process [found] its opportunity and power."¹⁴⁶ It remained only for the Court to clarify what it meant by "voluntary relinquishment" of citizenship and to rule on the standard and allocation of the burden of proof in loss of nationality proceedings. The opportunity came in 1980 when it heard and decided *Vance v. Terrazas*,¹⁴⁷ and in so doing unanimously affirmed the essential proposition of *Afroyim* that loss of citizenship depends on whether the citizen assents to its loss.

3. *Vance v. Terrazas Clarifies Afroyim*

"*Afroyim* emphasized that loss of citizenship requires the individual's 'assent,' 387 U.S., at 257, in addition to his voluntary commission of the expatriating act," the Supreme Court stated in *Terrazas*.¹⁴⁸ Continuing, it declared: "It is difficult to understand that 'assent' to loss of citizenship would mean anything less than an intent to relinquish citizenship, whether the intent is expressed in words or is found as a fair inference from proved conduct."¹⁴⁹ "In the last analysis," the Court asserted, "expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct."¹⁵⁰

The Supreme Court believed it would be inconsistent with *Afroyim* to treat the expatriating acts enumerated in the statute "as

144. *Id.* at 293.

145. *Id.* at 269 n.1.

"Whatever the Court's position," he wrote,

[i]t has assumed that voluntariness is here a term of fixed meaning; in fact, of course, it has been employed to describe both a specific intent to renounce citizenship, and the uncoerced commission of an act conclusively deemed by law to be a relinquishment of citizenship. Until the Court indicates with greater precision what it means by 'assent,' today's opinion will surely cause still greater confusion in this area of the law.

Id.

146. B. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 165 (1921).

147. 444 U.S. 252 (1980). Justices Marshall, Brennan, Stevens and Stewart dissented, but on other grounds.

148. *Id.* at 260.

149. *Id.*

150. *Id.*

the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen," although any of the specified acts might be "highly persuasive evidence" of a purpose to abandon citizenship.¹⁵¹

Upholding the constitutionality of the statutory provision that the government bears the burden of proving by a preponderance of the evidence that the citizen intended to relinquish United States nationality, the Court rejected the argument that proof of intent to relinquish citizenship should be by "clear and convincing" evidence.¹⁵² Proving intent (even by a preponderance of the evidence) is in itself a "heavy burden," the Court observed.¹⁵³

Afroyim as elaborated by *Terrazas* manifestly was a watershed in the law of expatriation. It delineated, probably once and for all, the rights of the citizen and the powers of Congress with respect to those rights. The question whether as a matter of public policy it is desirable that the state should not be allowed to deter its citizens by threat of expatriation from doing things abroad which might complicate the conduct of foreign policy is now an academic one. The Supreme Court has ruled that as a constitutional matter the interest of the state in the untrammelled conduct of foreign relations is subordinate to the absolute grant of citizenship of the first section of the Fourteenth Amendment to the Constitution.

Afroyim as clarified by *Terrazas* has had the somewhat surprising consequence of sanctioning duality of citizenship and allegiance. Such status (other than that which resulted from operation of law, that is, from circumstances over which the individual had no control) has long been regarded negatively in the United States.¹⁶⁴ As the

151. *Id.* at 261 (quoting *Nishikawa v. Dulles*, 356 U.S. 129, 139 (1958) (Black, J., concurring)).

152. *Id.* at 267.

Section 349(b) of the Immigration and Nationality Act, 8 U.S.C. 1481(b), provides in pertinent part that "whenever the loss of United States nationality is put in issue in any action or proceeding. . . , the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence." (See *supra* note 96).

The United States Court of Appeals for the 7th Circuit, from whose decision in *Terrazas v. Vance* the government sought a writ of certiorari, had held that:

A clear, convincing and unequivocal evidence standard is the minimum burden of proof that can satisfactorily guarantee that the individual's interest in the retention of his citizenship is protected adequately. . . . We therefore conclude that the Fourteenth Amendment requires the government to prove by clear, convincing and unequivocal evidence that plaintiff voluntarily relinquished his United States citizenship.

Terrazas v. Vance, 577 F.2d 7, 12 (7th Cir. 1978).

153. *Terrazas v. Vance*, 444 U.S. at 267.

154. H.R. Doc. No. 326, 59th Cong., 2d Sess. 23 (1906-1907). See also *Savorgnan v. United States*, 338 U.S. 500, 501 (1950):

[T]emporary or limited duality of citizenship has arisen inevitably from differences in the laws of the respective nations as to when naturalization and expa-

State Department's Citizenship Board of 1906 said in support of its recommendations on expatriation which became the Act of March 2, 1907:

"It is true that because of conflicting laws on the subject of citizenship in different countries a child may be born to a double allegiance; but no man should be permitted deliberately to place himself in a position where his services may be claimed by more than one government and his allegiance be due to more than one."¹⁵⁵

However, as judicial and administrative appellate decisions rendered in the past twenty years have shown, if the government has been unable to prove that a citizen who performed an expatriative act intended to relinquish his citizenship, duality of citizenship or allegiance has been the result. Despite the injunction of all three branches of government over the years that dual allegiances should not be countenanced, one would be hard pressed to adduce evidence that such outcomes have seriously burdened the conduct of the foreign relations of the United States.

Justice Brennan is of the view that the court overlooked the real meaning of *Afroyim*. The proper conclusion to be drawn from *Afroyim*, he asserted, is that only formal renunciation of United States nationality will, as a constitutional matter, support a holding that a citizen intended to terminate his relationship to the United States.¹⁵⁶ Dissenting in *Terrazas*, he pointed out that *Terrazas* was governed by *Afroyim*, which emphasized the crucial importance of citizenship, and "held unequivocally that a citizen has 'a constitutional right to remain a citizen. . . unless he voluntarily relinquishes that citizenship.'"¹⁵⁷ Continuing, the Justice noted that *Afroyim* held that "the only way citizenship . . . could be lost was by the voluntary renunciation or abandonment by the citizen himself."¹⁵⁸

triation shall become effective. There is nothing, however, in the Act of 1907 that implies a congressional intent that, after an American citizen has performed an overt act which spells expatriation under the wording of the statute, he, nevertheless, can preserve for himself a duality of citizenship by showing his intent or understanding to have been contrary to the usual legal consequence of such an act.

And see *supra* note 60 and accompanying text. Secretary of State Hay said in 1898:

It is inconsistent for an individual to bear true allegiance at the same time to two different sovereigns, and the exercise of the right of citizenship under any alien sovereignty must be regarded as a voluntary assumption of the obligations of allegiance to such sovereignty.

III Moore, *supra* note 16 § 469, at 735.

155. H.R. Doc. No. 326, 59th Cong., 2d Sess. 23 (1906-1907).

156. *Terrazas*, 444 U.S. at 274 (Brennan, J., dissenting).

157. *Id.* at 274-75 (quoting *Afroyim v. Rusk*, 387 U.S. 258, 268 (1967)).

158. *Id.* at 275 (quoting 387 U.S. at 266).

The *Afroyim* court further held, he observed, that "because Congress could not 'abridge,' 'affect,' 'restrict the effect of,' or 'take away citizenship,' Congress was 'without power to rob a citizen of his citizenship' because he voted in a foreign election."¹⁵⁹ In the Justice's opinion, the same "clearly must be true of the government's attempt to strip appellee [Terrazas] of citizenship because he swore an oath of allegiance to Mexico."¹⁶⁰ Congress provided for a procedure by which one may formally renounce citizenship, he continued.¹⁶¹ In *Terrazas*, the United States conceded that appellee had not renounced his citizenship under that procedure. It therefore followed, the Justice concluded, "because one can lose citizenship only by voluntarily renouncing it and because appellee had not formally renounced his, I would hold that he remains a citizen."¹⁶²

Justice Brennan's exegesis of *Afroyim*, emblematic of the great jurist's solicitude for the citizen's constitutional rights, has undeniable force and logic. Formal renunciation of United States citizenship according to law is undeniably the sole statutory expatriative act that expresses unambiguously a will and purpose to terminate allegiance to the United States. It is unlikely, however, that the Supreme Court as presently constituted will accept Justice Brennan's construction of *Afroyim*. It seems clear that the *Terrazas* Court was of the view that Congress has the constitutional power to specify what acts, if done voluntarily and with the intention of relinquishing citizenship, will result in expatriation. Accordingly, the Court left no doubt that since the seven statutory expatriative acts are so conditioned, they are constitutionally valid. Nonetheless, Justice Brennan's *Terrazas* dissent makes it pertinent and respectable to question whether any vital government interest would be frustrated were the United States, like other civilized nations, to prescribe only one ground for loss of nationality.

4. *Judicial and Administrative Experience after Terrazas*

While the Supreme Court's decision in *Terrazas* clarified points left ambiguous by *Afroyim*, it did not define conduct that would support a finding that a citizen who performed a statutory expatriative

159. *Id.* (quoting 387 U.S. at 267).

160. *Id.* at 275.

161. *Id.* (citing INA § 348(a)(6); 8 U.S.C. § 1481(a)(6)).

That section now prescribes how one may formally renounce citizenship in the United States in wartime. Before the INA was amended in 1978 to renumber the acts of expatriation, section 349(a)(6) prescribed loss of citizenship for formal renunciation of citizenship before a consular officer in a foreign state. Section 349(a)(5) is now the statutory provision for formal renunciation in a foreign state.

162. *Id.*

act intended to terminate citizenship; the matter was left to the inferior courts to determine.

Since 1980, courts in four circuits have decided cases brought by citizenship claimants seeking relief from an adverse nationality determination made by the Department of State, and in doing so have made rules for determining conduct that manifests intent to relinquish citizenship. In three cases, the courts held that the government carried its burden of proving by a preponderance of the evidence that the citizen intended to relinquish nationality by establishing that the citizen not only performed a valid expatriative act voluntarily, but at the same time also expressly renounced United States citizenship, and subsequently acted in a manner inconsistent with that of one who considered himself a United States citizen.¹⁶³ In a fourth case, the government sustained its burden of proof by establishing that a citizen voluntarily made a formal renunciation of United States citizenship in the manner prescribed by law and the Secretary of State.¹⁶⁴

Another case held that the government failed to meet its burden of proof, even though the citizen involved signed a foreign naturalization application which stated that he renounced United States nationality; the court considered that the circumstances surrounding his signing the renunciatory statement were too ambiguous to establish an intent to relinquish citizenship.¹⁶⁵ Another American citizen prevailed because the court found in statements he made immediately before and after he entered the parliament of a foreign state a clear expression of intent to retain citizenship.¹⁶⁶

Although the courts have decided only a handful of loss of nationality cases since *Terrazas*, the criteria they applied in those cases with respect to conduct that is sufficient to support a finding of intent to relinquish citizenship have been, as far as they go, useful, indeed essential, guidelines for both the Board of Appellate Review and the Department of State to use in making (it is hoped) sound

163. *Terrazas v. Haig*, 653 F.2d 285 (7th Cir. 1981), (appellant made an oath of allegiance to Mexico with an express declaration of renunciation of American nationality and sought relief from selective service on grounds he was not a U.S. citizen); *Richards v. Secretary of State*, 752 F.2d 1413 (9th Cir. 1985) (appellant obtained naturalization in Canada, declared that he renounced allegiance to the United States, and generally held himself out to United States authorities as a Canadian citizen). On facts rather similar to *Richards*, see *Meretsky v. Department of Justice*, No. 86-5184 (D.C. Cir. 1986) (mem.).

164. *Maldonado-Sanchez v. Shultz*, 706 F. Supp. 54 (D.D.C. 1989).

165. *Parness v. Shultz*, 669 F. Supp. 7 (D.D.C. 1987).

166. *Kahne v. Shultz*, 653 F. Supp. 1486 (E.D.N.Y. 1987).

and reasonably consistent decisions on loss or retention of citizenship. Nonetheless, loss of citizenship cases are fact-specific, and there are no simple certainties when it comes to making a judgment on the issue of intent to relinquish citizenship. Each case must be carefully culled to extract the relevant elements of decision.

To no type of case is the foregoing generalization more apposite than to one of loss of nationality as a result of procuring naturalization in a foreign state. Until fairly recently, the Board of Appellate Review and the Department of State have frequently differed about the conclusions to be drawn from a situation where an American citizen has obtained naturalization in a foreign state which does not require applicants to renounce their previous nationality. Typically in such cases, after obtaining naturalization, the American citizen may do nothing for a long time to show affirmatively an intent to retain U.S. citizenship. The citizen may even later state that he or she assumed naturalization would result in loss of U.S. citizenship, yet do nothing after naturalization expressly derogatory of United States citizenship. Such cases may be described as ones of "simple naturalization."

Approximately 120 of the 200 cases the Board has decided on the merits since 1980 have involved naturalization in a foreign state.¹⁶⁷ Of those 120, a substantial majority were appeals by persons who were subjects of "simple naturalization" in a foreign state. In deciding such cases, the Board has rejected the Department's arguments that failure affirmatively to behave as an American citizen after naturalization manifests an intent at the time the act was done to relinquish citizenship. In the Board's view, passive conduct, although open to criticism, does not warrant an inference of prior intent to terminate citizenship. Acts of omission, the Board has said, are too equivocal to permit one to make a comfortable decision with respect to the priceless right of citizenship. Doubts about the facts must to the extent reasonably possible be resolved in favor of the citizen.¹⁶⁸ Accordingly, in about 40 cases of "simple naturalization" the Board reversed the Department's holding of loss of citizenship. In roughly another 40 cases, with generally similar fact situations, the Department in effect conceded that it could not prevail before the Board, and requested that the Board remand the case so that it might quash

167. See 4-19 Ops. Bd. of App. Rev. (1980-1989).

168. See *Nishikawa v. Dulles*, 356 U.S. 129, 134-35 (1958):

This Court has said that in a denaturalization case, 'instituted. . .for the purpose of depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen.' *Schneiderman v. United States*, 320 U.S. 118, 122.

See also *United States v. Minker*, 350 U.S. 179, 197 (1956) (concurring opinion): "When we deal with citizenship we tread on sensitive ground."

the certificate of loss of nationality.

In the remaining one-third of the naturalization cases, the Board affirmed the Department's determination of loss of citizenship. Drawing on apposite judicial precedent, the Board took the position that if a citizen obtained naturalization in a foreign state, declared that he renounced United States citizenship, and subsequently did or said nothing of sufficient evidential weight to cast doubt on the abjuration of American citizenship made upon doing the expatriative act, the evidence showed preponderantly an intent to relinquish citizenship.

5. The Department of State Adopts a New Evidentiary Standard to Determine the Issue of Intent

In the spring of 1990, the Department of State made a policy decision of first importance with respect to the processing of loss of nationality cases. The Department adopted a new standard of evidence to determine the issue of intent to relinquish citizenship.¹⁶⁹ The new standard is based on the premise that American citizens actually intend to retain United States citizenship even when they perform one of the following acts denominated by statute as expatriative: (1) obtain naturalization in a foreign state; (2) subscribe to routine declarations of allegiance to a foreign state; or (3) accept non-policy level employment with a foreign government. A citizen who performs one of the foregoing acts and wishes to retain citizenship, the Department states, need not, prior to doing so, submit a statement or evidence of intent to retain citizenship; an intent to retain citizenship will be presumed.

The Department emphasizes that the premise of intent to retain citizenship is not applicable when the citizen (1) formally renounces United States citizenship as provided by law; (2) takes a policy-level position with a foreign government; (3) is convicted of treason; or (4) performs a statutory expatriative act and behaves in a manner so inconsistent with intent to retain citizenship that the conclusion is inescapable that the citizen intended to relinquish citizenship. The

169. The new evidentiary standard to determine the issue of intent to relinquish citizenship and instructions regarding its implementation were communicated to all diplomatic and consular posts by telegram dated April 16, 1990. From that date the Department has applied the new evidentiary standard in making adjudications of all potential loss of nationality cases submitted to it. On September 21, 1990, the Department made public an information sheet entitled "Advice about Possible Loss of U.S. Citizenship and Dual Nationality," explaining the new standard and how it is being implemented.

fourth category, the Department observes, is very rare.

An individual who has performed any one of the seven statutory expatriating acts and who wishes to terminate citizenship may do so by affirming in writing to a United States consular officer that the act was performed with the intention of relinquishing citizenship. A citizen always has the option of making a formal renunciation of nationality. The Department will apply the premise of intent to retain citizenship to cases it has adjudicated previously.¹⁷⁰

Finally, the Department points out that when a United States citizen obtains naturalization in a foreign state and is held not to have lost citizenship, the individual may consequently possess dual nationality. The Department adds that while the United States does not favor dual nationality as a matter of public policy, it does recognize its existence in individual cases.

How to explain this significant departure of the Department? The Department concluded that it is apparent after studying the administrative disposition of loss of nationality cases during recent years, and decisions of the Board of Appellate Review, that, a new approach should be adopted to simplify and make as uniform as possible the adjudication of loss of nationality cases in the Department inasmuch as the issue of intent to relinquish citizenship is so inherently and uniquely difficult to determine in many types of cases. The new standard, it evidently is hoped, will ensure that the Department's obligation under the statute to act where there clearly is intent to relinquish citizenship remains intact, and will obviate the need to defend protracted appeals involving ambiguous conduct and often confusing indicia of intent.

The new evidentiary standard reveals the Departments' enlightened approach to its responsibilities under the statute and is eloquent acknowledgment that citizenship is indeed a right beyond price. By requiring that holdings of loss of nationality rest on the firmest possible evidentiary footing, the new standard should ensure that citizenship will be forfeited only when a citizen gives an unmistakable signal he or she wishes to terminate allegiance to the United States.

IV. ADMINISTRATIVE AND JUDICIAL REVIEW OF DETERMINATIONS OF LOSS OF CITIZENSHIP

Today, a person who is the subject of an adverse citizenship determination by the Department of State has administrative and judicial

170. The new evidentiary standard is not, of course, applicable to cases appealed to the Board of Appellate Review where the Board has made a decision on the merits upholding the adverse determination of the Department. Decisions of the Board are final, subject only to the right of either party to move for reconsideration of the Board's decision. 22 C.F.R. §§ 7.9, 7.10 (1990).

avenues of relief guaranteed by statute or regulations having the force of law.

The Board of Appellate Review of the Department of State, an autonomous, quasi-judicial body established in 1967, hears and decides appeals by individuals who have been the subject of an adverse citizenship decision.¹⁷¹ In considering appeals from such determinations, the Board determines whether an individual received procedural and substantive due process when the Department decided he or she forfeited United States nationality by performing a statutory expatriative act in a foreign state. If the Board concludes that the Department's decision is contrary to law or fact, it will grant relief by reversing that decision.

Decisions of the Board are not reviewable by an officer of the Department of State. They are final, subject to the right of either party to move for consideration. An appellant who has been unsuccessful before the Board may institute an action in a federal district court for a judgment declaring the appellant to be a United States citizen.¹⁷²

From 1940 to 1967 a panel in the Department of State reviewed loss of nationality decisions, but it lacked the autonomy that the Board of Appellate Review enjoys today.¹⁷³ Before 1940, however, there was no departmental procedure for appellate review of adverse nationality decisions. Persons like Henry James who expatriated themselves under the provisions of the Act of 1907, or before that time pursuant to rulings made by the Secretary of State, might remonstrate with the Department, but to judge from the digests apparently few, if any, did so.

A. Judicial Review—A Trial de Novo

With respect to judicial review, the Immigration and Nationality Act of 1952 prescribes that a person in the United States who claims a right or privilege as a national of the United States and who is

171. For a comprehensive study of the Board of Appellate Review, see James, *The Board of Appellate Review of the Department of State: The Right to Appellate Review of Administrative Determinations of Loss of Nationality*, 23 SAN DIEGO L. REV. 261 (1986).

The Board derives its authority from federal regulations, Part 7 of Title 22, Code of Federal Regulations (22 C.F.R. § 7.2 (1989)).

172. The right to institute such an action is provided by INA. § 360, 8 U.S.C. § 1503 (1988). The Department of State has no judicial recourse from an adverse decision of the Board.

173. James, *supra* note 167, at 265-69.

denied such right or privilege may, within five years after the final administrative denial thereof, institute an action in federal district court for a judgment declaring him or her to be a United States citizen.¹⁷⁴ The act also provides a procedure whereby a person not in the United States may enter to prosecute such an action.

The Nationality Act of 1940 had a similar but more liberal provision which read in pertinent part as follows:

If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States such person. . . regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States.¹⁷⁵

The Cabinet Committee appointed by President Roosevelt to review, recommend and codify the nationality laws of the United States recommended no provision for judicial review in what became the Nationality Act of 1940. The Committee was of the opinion that such a provision was unnecessary.¹⁷⁶ The Committee asserted that:

It may be added that a person who shall have been denied recognition abroad as an American national by a diplomatic or consular officer of the United States, upon the ground that such person had expatriated himself by the performance of one of the acts specified in this chapter would not be without a legal remedy in case he should deem the ruling in his case unjustified and such ruling should be upheld by the Department of State.¹⁷⁷

The Committee pointed out that aggrieved persons had recourse to the writ of *habeas corpus* and a new (1934) statutory provision for a declaratory judgment.¹⁷⁸ The Senate, however, did not accept the Committee's recommendation and insisted that there be a specific provision for judicial review. Indeed, the only important amendment the Senate made to the House bill was the section on judicial review.

A number of suits were instituted in federal courts under the judicial review provisions of the Nationality Act of 1940, the outcome of

174. INA § 360, 8 U.S.C § 1503 (1988).

175. The Nationality Act of 1940 § 503, ch. V, 54 Stat. 1137, 1171-72 (1940).

In 1950 the Senate Judiciary Committee, which then was looking into the immigration and nationality laws of the United States, considered the foregoing provision too liberal. "It has been subject to broad interpretation," the Committee stated, "and. . . has been used in a considerable number of cases to gain entry into the United States where no such right existed." The Committee therefore recommended that the privilege of instituting an action for a declaratory judgment be limited to persons in the United States (this recommendation was not adopted) and that the limit on the right be five years after the finding that the person is not a citizen.

SENATE COMMITTEE ON JUDICIARY, THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. REP. NO. 1515, 81st Cong., 2d Sess. 776, 777 (1950).

176. See *supra* note 82, at 78.

177. *Id.*

178. *Id.*

which, as one commentator quite validly noted, "emphasized the value of this provision in protecting the individual against arbitrary administrative determinations."¹⁷⁹ Before enactment of the Nationality Act of 1940, a person who wished to obtain a judicial determination of citizenship had to rely on common law remedies to get into court, although the Act of June 14, 1934 thereafter provided the alternative avenue of a declaratory judgment.¹⁸⁰

B. *The Years Without Assurance of Judicial Review*

From the earliest years of the Republic, federal courts (and state courts with respect to the citizenship provisions of state constitutions) were called upon to make determinations of citizenship. The disposition of causes of action involving, for example, title to real property and the right to inherit, turned on whether the court concluded that the party claiming title was or was not a United States citizen. The early cases laid down no uniform rules on what acts would or would not constitute expatriation, in part because federal courts, particularly the Supreme Court, generally followed the doctrine of indefeasible allegiance.¹⁸¹ With passage of the Act of July

179. Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. OF PA. L. REV. 25, 69 (1951).

Roche cited seven cases brought under section 503 that had been won by the government in the ten years from 1940 to 1950, and 14 lost by the United States in the same period.

180. Codification, *supra* note 82, at 78.

Provision for a declaratory judgment was made by the Act of June 14, 1934, 48 Stat. 955 which amended section 274 of the Judicial Code.

181. See *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64 (1804); *M'Ilvaine v. Cox's Lessee*, 8 U.S. (4 Cranch.) 209 (1808); *The Santissima Trinidad*, 20 U.S. (Wheat.) 283 (1822); *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99 (1830); *Shanks v. DuPont*, 28 U.S. (3 Pet.) 242 (1830). These early opinions of the United States Supreme Court are notable for the justices' disquisitions on whether a citizen might expatriate himself without sanction of the state, but they "manifestly had settled nothing, and the 'great question as to the right of expatriation' was unresolved." Gordon, *The Citizen and the State Power of Congress to Expatriate American Citizens*, 53 GEO. L.J., 315, 321-22 (1965).

Courts also were called upon to make citizenship determinations in order to decide such practical matters as whether a plaintiff had standing to sue in federal court. See *Jennes v. Landes*, 85 Fed. 801 (N.D. Wash. 1897). There the court was required to determine whether the complainant had lost her United States citizenship when she married a British subject and went with him to live in Canada. The complainant, who brought the action in federal court for an accounting with respect to certain property she allegedly owned in the State of Washington, argued that she had expatriated herself and therefore might sue in federal court on the grounds of diversity of citizenship. The court agreed with the complainant that she lost her U.S. citizenship when she became a British subject, and accordingly ruled that she might sue in federal court.

Cf. *Comitis v. Parkerson*, 56 Fed. 556 (E.D. La. 1893), *appeal dismissed*, 163 U.S.

27, 1868 the controversy about whether the doctrine of perpetual allegiance applied in the United States ended, and federal courts held that the consent of the state was not necessary to effect expatriation.¹⁸² Until around the turn of the century, however, there seems to have been little recourse to the courts by persons who were held to have lost (or not to have acquired) citizenship.

In the last quarter of the 19th century, while the Secretary of State determined questions of expatriation without benefit of legislative mandate, officials of the Department of the Treasury, and, after 1905, of the Commerce and Labor Department, decided citizenship status in exclusion and deportation proceedings pursuant to the so-called Chinese Exclusion Acts and other legislative enactments.¹⁸³ Many persons who were denied entry into the United States or were detained pending deportation because they allegedly were aliens sought judicial review of their claim of United States citizenship by petition for the "great writ," *habeas corpus*.

C. Habeas Corpus as Vehicle to Obtain Judicial Review

The Cabinet Committee which studied the nationality laws pointed out in its 1939 report that a person who was denied entry into the United States might

upon arrival at a port of entry into the United States, and denial of entry as a national, resort to *habeas corpus* proceedings upon the ground that he is entitled to enter the United States as a national thereof. There seems to be no doubt as to the possibility of having a judicial decision in cases of this kind, if a person applying for admission to the United States as a national thereof submits substantial evidence of facts upon which his claim to American nationality may be based is denied a fair hearing upon the facts, *Chin Yow v. United States* (1907), 208 U.S. 8, or the facts being admitted, he is denied admission upon the ground that under the law he has not American

681 (1896). The complainant, who married a foreign national but lived with him in Louisiana rather than departing from the United States, was held not to have lost her United States citizenship, and thus had no standing to sue in federal court for an accounting on property she owned in Louisiana.

182. *Jennes*, 85 Fed. at 801; *Comitis*, 56 Fed. at 556. There are few reported cases on this subject.

183. In 1882, Chinese immigration was suspended for ten years. Act of May 6, 1882, ch. 126, 22 Stat. 58, *as amended by* Act of July 5, 1884, ch. 220, 23 Stat. 115. However, Congress did not lift the suspension after ten years, but in actuality, enacted an even more stringent exclusion law. By the Act of May 5, 1892, ch. 60, 27 Stat. 25. Subsequent legislation kept the bar firmly in place.

The Act of March 3, 1891, ch. 551, 26 Stat. 1084, established classes of aliens other than Chinese who should be excluded, and created the office of Superintendent of Immigration in the Department of the Treasury. Inspection officers were authorized to examine persons wishing to enter and determine their eligibility. The decisions of such officers were to be final, unless an appeal was taken to the Superintendent of Immigration whose decisions were reviewable by the Secretary of the Treasury.

By the Act of February 14, 1903, ch. 552, 32 Stat. 825, jurisdiction over immigration was transferred to the Department of Commerce and Labor.

nationality, *Weedin v. Chin Bow*, 274 U.S. 657 (1927).¹⁸⁴

With respect to judicial review of citizenship by persons held in deportation proceedings, the Cabinet Committee stated:

The question of nationality may also be presented to a court for determination through *habeas corpus* proceedings in the case of a person who has previously entered the United States and is held for deportation from the United States as an alien but who claims the right to remain in the United States upon the ground that he is a national thereof (*Ng Fung Ho*, 259 U.S. 276 (1921); *United States ex rel. Bilokumsky v. Todd*, 263 U.S. 149 (1923)).¹⁸⁵

"Some of the most important decisions of the courts in this country concerning nationality," the Committee added, "have been obtained through *habeas corpus* proceedings," citing *United States v. Wong Kim Ark*.¹⁸⁶

Wong Kim Ark is truly a landmark case, notable not only as an illustration of the successful deployment of a petition for *habeas corpus*, but more significantly for the great constitutional principle it expounded. The petitioner, upon return from a short trip to China, was denied entry and detained, pending deportation, by the collector of the port of San Francisco on the pretense that he was not a citizen of the United States. He petitioned for a writ of *habeas corpus* in district court, which issued the writ. The government appealed to the Supreme Court, which held that the writ was properly issued. The Court concluded that the petitioner, although born in the United States of parents who were subjects of the Emperor of China, became a United States citizen at birth by virtue of the first section of the Fourteenth Amendment to the Constitution.

Said the Court:

The fact, therefore, that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, 'All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States.'¹⁸⁷

184. Codification, *supra* note 82, at 78.

185. *Id.*

186. *Id.* at 79. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

187. 169 U.S. at 704.

The Act of May 6, 1882 provided: "Sec. 14. That hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed." (22 Stat. 61; 8 U.S.C. § 363).

See also the following cases where the person denied entry filed a petition for a writ of *habeas corpus* and obtained a judicial decision on his citizenship: *Gonzalez v. Williams*, 192 U.S. 1 (1904); *In re Nicola*, 184 Fed. 322 (2nd Cir. 1911); *Ex parte Griffin*, 237 Fed. 445 (N.D.N.Y. 1916); *United States ex rel. Anderson v. Howe*, 231 Fed. 546

Many who petitioned for a writ of *habeas corpus* were not successful. While the Supreme Court held that one who claimed citizenship and made a showing that the claim was not frivolous, was entitled, under the fifth amendment, to judicial review of the claim, the mere fact that one claimed citizenship did not entitle the petitioner to a judicial hearing unless it was established: that departmental officials had denied petitioner citizenship at a fair hearing; had acted in some improper way; had abused their discretion; had made a finding not supported by the evidence; or had applied an erroneous rule of law. Absent such circumstances, the Supreme Court generally held that the administrative decision regarding exclusion or deportation was final and that it was the duty of the court to which application was made for issuance of a writ of *habeas corpus* to dismiss it.¹⁸⁸

D. Other Remedies

Mandamus was also available to persons who were denied a right or privilege as a United States citizen. The petitioner in *Mackenzie v. Hare* was living in San Francisco and sought a writ of *mandamus* to compel the California authorities to register her as a voter. The authorities had denied her registration on grounds that she became an alien by expatriating herself under the provisions of section 3 of the Act of March 2, 1907 when she married a foreign national.¹⁸⁹ After a state court denied Mrs. MacKenzie's petition for the writ, she appealed to the Supreme Court which reviewed her argument that she remained a citizen despite marriage to an alien. The Court, however, affirmed the judgment of the California court on the grounds that she voluntarily brought herself within the purview of the Act of March 2, 1907, which, the Court held, was a constitutionally sanctioned exercise of congressional power.¹⁹⁰

In *Perkins v. Elg*, Ms. Elg brought a bill in district court for a declaratory decree establishing her status as an American citizen and for injunctive relief against the Secretary of Labor and others.¹⁹¹ The Department of Labor, which then had jurisdiction over the Immigration Service, held that Ms. Elg was an alien. The district court entered a decree declaring her to be a United States citizen. An appellate court affirmed and the Secretary of Labor petitioned for certiorari. After reviewing Ms. Elg's claim to citizenship with great care, the Supreme Court held that she was a United States citizen.

Before 1940, the right to judicial review was by no means assured.

(S.D.N.Y. 1916); *Camardo v. Tillinghast*, 29 F.2d 527 (1st Cir. 1928).

188. See *Quon Quon Poy v. Johnson*, 273 U.S. 352 (1926); and *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

189. 239 U.S. 299 (1915).

190. *Id.* See *supra* note 104 and accompanying text.

191. 307 U.S. 325 (1939).

Granted, there were avenues for relief, as elaborated above. But in order to petition for a writ of *habeas corpus* or *mandamus*, or, after 1934, to seek a declaratory judgment, a person had to be in the United States or attempting to enter. The remedies could only be pursued in the United States. Persons abroad who wished to contest an adverse determination with respect to nationality were virtually without means of relief. "What recourse," it has been asked,

did an American have who was informed by the Consul at Benin or Rangoon that he was no longer a citizen? The records do not disclose that any provision was made for this type of case. The only feasible alternative for such a person was to try to slip into the United States surreptitiously and, when apprehended, sue out a writ of *habeas corpus*. Considering the importance of American citizenship, there were remarkably few procedural safeguards protecting the individual against loss of nationality by administrative injustice.¹⁹²

In 1904, Justice Brewer, who frequently dissented when the Supreme Court reversed the decisions of lower courts which had issued writs of *habeas corpus*, deplored the absence of a statutory provision for judicial review of claims of citizenship after denial by the administrative authorities. Dissenting in *United States v. Sing Tuck*, he stated eloquently the case for judicial review:

We have called American citizenship an 'inestimable heritage,' *Chin Bak Kan v. United States*, 186 U.S. 193, 200 [1902] and I cannot understand why one who claims it should be denied the earliest possible hearing in the courts upon the truth of his claim.

Why should any one who claims the right of citizenship be denied prompt access to the courts? If it be an 'inestimable heritage,' can Congress deprive one of the right to a judicial determination of its existence, and ought the courts to unnecessarily avoid or postpone an inquiry thereof?¹⁹³

Thirty-five years would pass before Congress acted, but act it finally did. And for the last half-century, anyone, whether living here or abroad, who contends that the administrative authorities erred in holding that the expatriation was self-inflicted has had a right, firmly anchored in statute and case law, to obtain from a federal court full and fair consideration of that persons' claim of possible administrative error. That right provides evidence that in the United States, citizenship is indeed held to be "an inestimable heritable."

V. REPRISE

In 1965, two years before the Supreme Court decided *Afroyim v. Rusk*, an eminent authority and practitioner expressed the view that

192. Roche, *supra* note 175, at 67-68.

193. *U.S. v. Sing Tuck*, 194 U.S. 161, 173 (1904) (Brewer, J., dissenting).

"the expatriation controversy [which] involves grave issues of national power and individual choice" was "an unfinished chronicle." He continued:

[A]lthough 175 years have elapsed since the adoption of the Constitution, we have not yet arrived at a clear understanding of the nature and extent of the power to expatriate American citizens. This lack of firm guidelines is surprising in an area as fundamental as the title to American citizenship. It is also significant that such uncertainty has persisted despite a constant awareness of the problem and debate as to its resolution. . . .

The clash of ideas and the close divisions in the Supreme Court suggest that this debate will continue and that the major issues are still largely unsettled. The extent to which the national need, expressed in the considered judgment of Congress, can effect the termination of citizenship status which the individual citizen does not wish to relinquish is still uncertain. The attainment of a stable solution to this problem will probably be deferred until its full implications are weighed by Congress, the courts and the people.¹⁹⁴

Twenty-five years later, it would be fair to say that the expatriation chronicle is as close to being finished as it is likely to be. The "clash of ideas" in the Supreme Court, characterized by the sharp divisions of the Court in *Perez v. Brownell*,¹⁹⁵ and *Aroyim v. Rusk*,¹⁹⁶ ended with the Court's decision in *Vance v. Terrazas*,¹⁹⁷ where the Court "unanimously reiterate[d] the principle set forth in *Afroyim v. Rusk* that Congress may not deprive an American of citizenship against his or her will, but may only effectuate the citizen's own intention to renounce citizenship."¹⁹⁸

Given the unanimity of the Supreme Court with respect to the Constitution's unconditional grant of citizenship, it would be safe to assume that neither the present Court nor a successor will repudiate the Constitutional principles enunciated in *Afroyim* and *Terrazas*. Thus, the remaining task in the judicial area is for the lower courts to lay down rules that give effect to the Supreme Court's holding that intent to relinquish citizenship may be expressed in words or found as a fair inference from proven conduct. That task obviously is not one of Constitutional dimensions.

Congress acknowledged in 1986 that the Constitution constrains its power to legislate on expatriation. When Congress amended the Immigration and Nationality Act to provide that loss of citizenship shall only ensue if a statutory expatriative act is done voluntarily with the intention of relinquishing citizenship, it brought the statute into line with the constitutional rulings of the Supreme Court.¹⁹⁹ It

194. Gordon, *supra* note 177, at 363-64. This survey of expatriation in the United States is masterly in its sweep and erudition.

195. 356 U.S. 44 (1958), *overruled by* 387 U.S. 253, 268 (1967).

196. 387 U.S. 253 (1967).

197. 444 U.S. 252 (1980), *reh'g denied*, 445 U.S. 920.

198. *Id.* at 272 (Stevens, J., dissenting on other grounds).

199. Pub. L. 99-653, § 18(a), Nov. 14, 1986, 100 Stat. 3659. That section

was as if history had come full circle in the century since one member of the House denied the power of Congress to legislate expatriation:

It is not the Government, but . . . the individual, who has the right and the only power of expatriation. . . . [I]t belongs and appertains to the citizen and not to the Government; and it is the evidence of his election to exercise his right, and not the power to control either the election or the right itself, which is the legitimate subject matter of legislation. There has been, and there can be, no legislation under our Constitution to control in any manner, the right itself.²⁰⁰

In the executive branch, too, the precepts of *Afroyim* and *Terrazas* have been given purposeful expression in the new standard adopted by the Department of State to determine what evidence will and will not support a finding of intent to relinquish United States citizenship.²⁰¹ Greater consistency and predictability in determinations of loss of nationality, and consequently fewer holdings of loss and subsequent appeals to the Board of Appellate Review and the courts, should be the fruit of thoughtful application of these guidelines.

In this year of notable anniversaries in the history of expatriation in the United States, one might confidently maintain that there is now coherence in precept and a fair degree of consistency of practice in the law of expatriation. The ferment in ideas that characterized the nineteenth and a good part of this century has been succeeded by a general harmony of view in government on the fundamental principles of expatriation.

amended section 349(a) of the Immigration and Nationality Act, 8 U.S.C. 1481(a) (1988) by inserting "voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" after "shall lose is nationality by";. . .

200. *Afroyim v. Rusk*, 387 U.S. 253, 265 (1967) (quoting Representative Van Trump of Ohio. CONG. GLOBE, 40th Cong., 2d Sess., 1804 (1868)).

201. See *supra* note 159.

